85-1843

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THOMAS M. RETTIG; EVA O. RETTIG

PETITIONERS,

V.

KENT CITY SCHOOL DISTRICT,

DONNA G. LIGHTEL, SUPERINTENDENT,

MICHAEL J. CHRIN, DIRECTOR
CHILD STUDY AND SPECIAL EDUCATION;

STATE OF OHIO BOARD OF EDUCATION,

FRANKLIN B. WALTER, SUPERINTENDENT
FOR PUBLIC INSTRUCTION,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUBMITTED BY:

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1. Based upon a judicial review of the documents contained in the Appendix hereto, more specifically, the administrative proceedings at A-1--6, the stealing from the District Court files in 1981 of "ALL EXHIBITS" by counsel for Respondent Kent City School District at C-10--12, the resultant flawed decisions of the judicial appellate proceedings at D-13--26 and F-35--42, together with all applicable law, including G-43--47 and H-48--50, are these Petitioners entitled to further review in this Court?

2. Based upon a judicial review of the documents contained in Appendix A-1--6 and the relevant documents in Appendix K-88--98, together with all applicable law, including G-43--H-50, did the Respondents State of Ohio Board of Education and Franklin B. Walter, Superin-

tendent for Public Instruction, accord these Petitioners due process and the equal protection under the laws?

3. Based upon a judicial review of the documents contained in Appendix K-77--98, together with all applicable law, including Appendixes G-43--J-76, did Respondents Kent City School District and its named employees accord Petitioner Thomas M. Rettig his rights under relevant statute(s) and under the equal protection clause of the United States Constitution? More specifically,

a. Based upon the "Findings of Fact" reported in Rettig v. Kent City School District, 539 F. Supp. 768 (N. D. Ohio, 1981), at page 773, and a judicial review of Appendix I-51--54, was Petitioner Thomas M. Rettig entitled to enrollment into Respondent Kent City School District's class for slow learning children in 1970 at age five?

b. Based upon a judicial review of the 1971 "Kent City Schools Psychological Summary", the unsigned and unfiled "E-1 Form" in Appendix K-77--80, together with school law then in effect, including I-51--64, did Petitioner Thomas Rettig receive equal protection under the laws; or was Respondent Kent City School District responsible for the determination of his "intelligence quotient" and placement or legal exclusion in accordance with school law, including I-54-55 and I-63-64?

c. Based upon a judicial review of the District Court's Findings of Fact, Ibid., Thomas spent 1971-74 at a private nursery school in Akron, the evaluation conducted on him as per the request of Respondent Chrin and reproduced in K-81--87, together with the then effective school law, including I-60, was Petitioner Thomas Rettig accorded equal protection under the laws for those three years?

d. Prior to Respondent Kent City School District's enrollment of Petitioner Thomas Rettig in 1974, the child had undergone another hospitalization where psychological services dictated behavior modification, K-87. State Standards for Special Education, J-66, were fully in effect and required an "educational program" ..."that reflects both educational and treatment components," J-70. Did the needs of Petitioner Thomas Rettig then require an "educational program" reflecting the mandates of J-70?

e. Based upon a judicial review of the November 1976 request for services, K-88-89, the "Psychological Report," K-90--96, together with State Standards for Due Process and Procedural Safeguards effective 28 Aug. 1976, J-66, 71-72, was Respondent Kent City School District required to provide for Petitioner Thomas Rettig such a "Placement Team Conference"? Without such

a "placement team conference," and in consideration of the expressed policy of Respondents Michael Chrin and Kent City School District, was Petitioner Thomas Rettig accorded due process and procedural safeguards and/or equal protection of the laws?

f. Considering the recommendation by the State's psychologist in 1976 at K-96

> Obviously, a heavy emphasis should be placed on developing a positive reinforcement or reward system so as to help shape desired behaviors and motivate responses in the teaching situation

and the then effective law, including the Standards for Special Education and Standards for Due Process and Procedural Safeguards listed on J-66 and discussed at J-70,71, was the Respondent Kent City School District responsible to provide this supportive service to Petitioner Thomas Rettig until such a time that a new evaluation indicated no more need for it?

g. Considering that the 1976 (above)

"evaluation" was the only evaluation conducted in behalf of Petitioner Thomas Rettig until the District Court Judgment filed 25 Aug. 1981 ordering one "in strict compliance"with federal regulaltions at B-7--9, together with the requirements of Standards for Identification of Handicapped Children providing the definition of "appropriate public education" at J-73, and effective 25 April 1977 at J-66, for those five years has Petitioner Thomas Rettig been receiving "appropriate public education" in strict compliance with the requirements of Standards for Multi-Factored Evaluation, Least Restrictive Placement and Individualized Educational Plan as in effect since 25 April 1977 at J-66, and including J-74--76?

h. Comparing the "evaluation" done by the State in 1976 above with the statutory requirement provided at 20 U.S.C. 1412 at G-45,46 and its implementing regulations effective 1 Oct. 1977 at H-48, did Re-

spondent Kent City School District identify "the nature and extent of the special education and related services" that Petitioner Thomas Rettig "needs"? See H-48 providing the definition for "evaluation" at 121a.500. Stated another way, has Petitioner Thomas Rettig been receiving a free appropriate public education meeting the statutory definition at G-47?

i. Included in the request for services in 1976, was one for after-school recreation at K-89. Respondent KentCity School District's policy against the provision is found at K-97,98. It became an issue at the administrative "remedies" hearings at A-1--6, and has remained so throughout the federal court proceedings at B-7, D-20, E-33, F-41-42. Does the Statute at G-45 require full educational opportunity for Petitioner Thomas Rettig? Stated another way, is Respondent Kent City School District required by the

Statute to provide him specially designed "nonacademic and extracurricular services and activities" as per H-49, including 121a.306(b)?

4. The District Court concluded, at Ibid., p. 777 (7)

> Because of his complicated handicapping conditions of autism and retardation, and because no multi-factored evaluation of Tom exists, it is almost impossible to accurately determine what his potential is, even if that were a proper role for this Court...

Further, that Court, at B-7,8,"ordered that the defendant school district conduct a multi-factored evaluation in strict compliance with 45 C.F.R.Section 121a.532." Respondent Kent City School District again failed to evaluate the effect the behavioral syndrome of autism has upon his learning. Petitioners sought relief in the District Court which ordered another round of exhaustion of administrative "remedies," resulting in another law suit.

See E-34. While a petition for rehearing was pending in the Court of Appeals at D-22, Petitioner E. Rettig consulted with Dr. LaVigna on 15 Jan. 1984, as the "referral date" on K-99 indicates. Petitioners were still unaware of the theft of "All Exhibits." Further, the District Court provided neither notice of its 26 Jan. 84 decision, nor an opportunity where these Petitioners might have submitted the 1984 "Assessment Report and Recommendations" prepared by this qualified psychologist, nationally recognized as an expert in the field of autism, and licensed by the State of California. See K-99--122. Petitioners filed in the Court of Appeals a copy together with the professional vita of Dr. LaVigna as Exhibit A to their Brief of 10 Dec. 1984.

a. Petitioners are wondering whether this private and most current evaluation can be fully considered by this Court to

formulate an appropriate relief?

b. Is Petitioner Eva Rettig entitled to reimbursement of the cost of this evaluation in light of the circumstances and/or this Court's holding in its case No.84-433 decided 29 April 1985, Burlington v. Department of Education, 53 LW 4509, at page 4510

> 1. The grant of authority to a reviewing court under 1415(e)(2) includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act. The ordinary meaning of the language in 1415(e)(2) directing the court to "grant such relief as (it) determines is appropriate" confers broad discretion on the court. To deny such reimbursement would mean that the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards of the Act would be less than complete.

Respondent School District has been objecting to Judge Lambros' order for such an evaluation; and in the Court of Appeals.

5. In his report of April 1984, at K-100, Dr. LaVigna includes in his

Data Source

> 1) direct observation of Tom's behavior at home;
> 2) direct testing of Tom's behavior in response to instructional stimuli;
> 3) an analysis of "multi-disciplinary multi-facored evaluation reports" prepared by Kent Public Schools in October 1981; ....
> 7) a review of Tom's present, and the two preceeding IEPs; ...

He concludes on page K-105, 106

> ... I would add to this list, one consideration that I feel has been lacking from previous discussions, reports and evaluations; that is, Tom's learning characteristics require the most powerful instructional technology available. His lack of motivation and his over-reliance on the cues and prompts provided by others, both of which are characteristics of autism and therefore a function of his handicap, require that his instructional programs utilize a very carefully designed motivational system and instructional sequences that use the most effective prompts available. Effective in this sense means prompts that not only elicit a correct response but which can also be systematically faced out over time. The startling lack of activities that Tom is able to carry out independent of someone else's presence (and prompting) is

> dramatic evidence that only minimal learning has occurred and that the necessary instructional technology which has been developed and implemented across the United States to meet educational needs such as Tom's has not been significantly employed. Rather than increasing his independence and self-sufficiency, which is the purpose of special education, the present program has a tendency to increase dependency and this subjects Tom to a likelihood of institutional placement in the future.

Thus, according to this expert's opinion, Respondent Kent City School District's 1981 evaluation and the IEPs for Tom did not address the behavioral needs, Tom's lack of motivation, etc. No other evaluation has been done by the District. Motions to dismiss the Rettigs are pending in the District Court of Judge Lambros, on res judicata grounds. Is this the proper time that this Supreme Court address the years based upon the 1981 evaluation of the District in response to the Judgment of 25 Aug.1981 at Ap. B-7 and 8? Appendix G-44 contains the law concerning the status of the child during the pendency of proceedings under 1415.

6. Based upon this Court's answers to the questions raised above, including those implied, and all applicable law, has Petitioner Thomas Rettig received his rights to due process and equal protection and his statutory right to special education, related services, and free appropriate public education meeting the Statutory definitions provided at 20 U.S.C. 1401(16),(17),and (18); or is he still entitled to those rights? If so, to how many years of FAPE, and at whose expense? Appendix G-47.

7. Under all applicable law, is Petitioner Thomas Rettig entitled to any additional years of appropriate services as compensation for the wrong done him? If so, how many; and at whose expense?

8. Petitioner Eva Rettig's request for a due process hearing on 1 March 1978 included a demand for copies of all the documents, at her expense, the Respondent

School District used as decisions regarding the "education" of her son, A-2. The documents included in the Joint Appendix filed on 1 March 85 in Cincinnati show that an attorney had to be engaged to receive "documents" from the school and from its hearing officer, and to represent the child at the fourteen sessions constituting the local administrative hearing. The parents received no hearing; they were witnesses only. The appeal to the Respondent State of Ohio Board of Education was prosecuted by this mother without an attorney. When that body refused to provide its final decision based upon State Standards, and persisted in ruling on a standard of "preponderance of the evidence," A-6, this law suit became a necessity. Is Petitioner Eva Rettig entitled to reimbursement for all costs and attorney fees for the administrative

hearings and/or for the District Court proceedings? If so, at whose expense?

9. After the filing of the "pre-argument statement" by her former attorney in the Court of Appeals in September 1981, he was fired by Petitioner Eva Rettig. Petitioners both have been represented by her in the Federal Courts ever since. On 16 October 1981 Rettig filed her own "Pre-Argument Brief" in the Court of Appeals because she did not want the other to go foreward and she so informed that Court. On 9 October 1981 that Court requested counsel for Respondent Kent City School District to provide for the transmission of the entire administrative record from Cleveland to Cincinnati as it was needed there for case No. 81-3586, the number assigned to the appeal of the Petitioners in 1981. See C-10--11. Petitioners were not informed by anyone.

Ten days later, on 19 October 1981, another member of the law firm walked off with "All Exhibits" which were then never judicially reviewed by either panel of the Court of Appeals, nor by this Court. See C-12. Considerable expenses have been incurred by this family. Is Petitioner Eva Rettig entitled to all costs and expenses associated with all levels of appeal; and if so, at whose expense?

10. Praying for a favorable remedy from this Honorable Court, what provisions for its implementation would this Court make to insure proper benefit for Petitioner Thomas Rettig in particular?

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REPORTS OF OPINIONS BELOW

The opinion of the District Court filed 25 August 1981 is reported at 539 F. Supp. 768; its judgment filed the same date is reproduced in the Appendix hereto, B-7--9. The Court of Appeals for the Sixth Circuit filed its opinion on 8 Nov. 1983, found at D-13--20. Concerning the remand, the District Court filed its opinion on 26 Jan. 1984, found at E-27--34. The opinion of the Court of Appeals filed 10 March 1986 is included at F-35--42.

The final decision of the State of Ohio Board of Education is reproduced at A-6. A-5 contains the relevant part of that body's appointed referee's report. The issues before the hearing officer and his conclusion are found at A-3--4; and the initial complaint filed by Petitioner Eva Rettig is at A-1--2.

C-10--12 contains the information concerning the stealing of the exhibits.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit denying the cross-appeal of Petitioners was filed 10 March 1986 (Appendix F-35--42). On 7 April 1986 that Court filed its

ORDER STAYING MANDATE

> Upon consideration, it is ORDERED the motion to stay issuance of the mandate pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed until the date on which the movant's application must be filed pursuant to 28 U.S.C. Section 2101 or Rule 20 of the Supreme Court Rules, as applicable. However, if within such time, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Upon the filing of a copy of an order denying the writ applied for, the mandate shall issue.
>
> ENTERED BY ORDER OF THE COURT
> JOHN P. HEHMAN, CLERK
> (signed)

Petitioner Eva Rettig invokes the jurisdiction of this Court pursuant to Sec. 615 of the Education of All Handicapped

Children Act of 1975, 20 U.S.C. 1415(e)(2) which Act grants jurisdiction of actions brought thereunder to the United States District Courts. District Court decisions are subject to full appellate review. The text of Section 615 of the Act is provided at Appendix G-43,44. In this case, the review procedure was initiated by Petitioner Eva Rettig with the filing of her complaint over the provision of the free appropriate public education to which her son, Petitioner Thomas M. Rettig, was then, and continues to be now, entitled under the same Act, 20 U.S.C. 1401 et seq. Petitioner Mother sought to challenge the "education" on hand of required evaluation procedures and mandates provided in the State of Ohio Standards for Special Education. For ninety (90) minutes, she addressed in open session of the Kent Board of Education meeting, together with its

superintendent, her dissatisfaction with the "education", based upon State Standards. The Kent City School District decided to refuse Petitioner Mother this type of due process hearing, as the record demonstrates. Instead, a hearing was provided wherein the issues set by an attorney for Petitioner Son and for the school district (Appendix A-3) were decided on a standard of proof by preponderance of the evidence by the state-appointed hearing officer (Appendix A-4). Petitioner Mother appealed this decision and again sought a disposition on the mandates provided in the State Standards. The state-appointed referee included this parental issue in his report to the State of Ohio Board of Education (Appendix A-5). He advised that body not to hear the request; and Petitioner Mother filed objections based upon State Standards in excess of two hundred (200) pages thereto.

When directed by the State Board to review the parental objections filed by Petitioner Mother without the lawyer, Respondent Franklin Walter, SPI, determined them "not well taken." For its part, on 12 Nov. 1979, Respondent State Board of Education (App. A-6) resolved

> 1. Affirming the conclusion of the impartial hearing officer that the Kent City School District has met its burden of proving by a preponderance of the evidence that it is providing a free and appropriate public education for Thomas M. Rettig...

Remaining "aggrieved," Petitioners filed, in the United States District Court, this action. The Court received the transcript of the fourteen hearing sessions and "all exhibits", including locally introduced documents and those documents constituting the State Level Review. In the Sixth Circuit Court of Appeals, Petitioners were both represented by Petitioner Eva Rettig and fully relied on "all exhibits" and on the mandates contained in State Standards.

What Petitioners were unaware of, however, is the fact that the Whalen law firm for the Kent City School District in 1981 was requested to provide for the transmittal of the transcripts and "all exhibits" from the District Court to the Court of Appeals where Petitioners' appeal had been filed. See Appendix C-10--11. Noone informed Petitioners; their brief was filed on 16 Oct. 1981. On 19 Oct. 1981, a member of the Whalen law firm removed from the Cleveland court files "All Exhibits." No judge signed the required form which form was filed on 19 Oct. 1981. See Appendix C-12. Petitioners were kept in the dark. Both their appeal and the cross-appeal of the school progressed to its final determination by the hearing panel resulting in the decision filed 8 Nov. 1983 found at D-13. Statutory and constitutional issues were never reached. Petitioners filed several attempts urging reconsideration both be-

fore they learned about the criminal activity (in the eyes of these petitioners) and after as well. All were unsuccessful. See App.D-21--24. Remaining denied the right to full appellate review, Petitioner Thomas Rettig sought review of his right to free appropriate public education in this Court. His efforts remained unsuccessful. See App. D-25--26. At that time, this Court filed its opinion in Smith v. Robinson, 52 LW 5179. At page 5185, this Court opines

> We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.

In this case, this meant that the case had been remanded to the District Court on the issue of extracurricular activities. App. E-27--34, filed 26 Jan. 1984. The District Court again refused to provide judicial review of the proceeding before the State

Board of Education, thus leaving unadjudicated the equal protection claims over the years beginning in 1970 of Petitioner Thomas and the due process claim of his mother regarding the State Board's refusal to provide its ruling based upon State Standards' mandates to the Kent City School District over the years it has and had authority and responsibility for the special education and related services as dictated by properly conducted evaluations by qualified personnel using appropriate instruments. The District Court did not notify Petitioners of its opinion and order reproduced at App. E-27--34. When Respondent Kent City School District filed its notice of appeal in Cincinnati, Petitioners filed their cross-appeal which was dismissed by the Court of Appeals on 10 March 1986. See F-35--42. Petitioners have not been accorded their rights to full appellate review and turn to this Court.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, STATE STANDARDS INVOLVED

Amendment XIV to the U.S.Constitution:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Education for All Handicapped Children Act of 1975, 20 U.S.C. 1401 et seq., relevant parts thereof appear at Appendix G-43--47.

Section 3321.07. Ohio Revised Code. Requirements for Child Not Attending Public Schools appears at Appendix I-60.

Section 3321.05. Ohio Revised Code. Determination of Capacity of Child; Record, Supervision of Incapable Children, I-61,62.

Regulations Implementing the Education for All Handicapped Children Act effective 1 October 1977, 45 C.F.R. 121a. Relevant sections appear at Appendix H-48--50.

Ohio State Board of Education Program Standards for Special Education:

a) Guidelines for the Administration of E.M.R. Programs, 1970, at Appendix I-51--54.

b) EDb-215-07 Program Standards for Special Education Units for Educable Mentally Retarded Children (Slow Learning) (Adopted August 1966) at Appendix I-55--58.

c) EDb-215-13 Program Standards for Legal Dismissal from School Attendance Due to Inability to Profit from Further Instruction (as in effect 1971), I-63,64.

d) Standards for Special Education, Effective June 30, 1973 at J-65--70.

e) Standards for Due Process and Procedural Safeguards for Handicapped Children and Youth, Effective 28 August 1976, 3301-51-16 are included at J-71,72.

f) Standards for Identification of Handicapped Children and Youth, 3301-51-17, Eff. 25 April 1977, at J-73.

g) Standards for Multi-Factored Evaluation, Least Restrictive Placement and Indi-

. vidualized Educational Plan, 3301-51-18, effective 25 April 1977, at J-74--76.

STATEMENT OF THE CASE

Petitioner Eva Rettig initiated this review procedure beginning with the year 1970 with the filing of her complaint on 1 March 1978, seeking to challenge, on the basis of mandates contained in State Standards for Special Education, the "education" provided by Respondent Kent City School District to Petitioner Thomas Rettig, her son who has infantile autism. Appendix A-1. No such hearing was provided. A lawyer had to be engaged to receive the parent requested documents, to represent Thomas, and to file documents before the state-appointed hearing officer, a law partner of the brother of the then superintendent of the Kent Schools. Thirteen months later, this officer vindicated Respondent Kent City School District (KCSD) on a burden of proof

"by a preponderance of the evidence." A-4. Within five days of the decision, Petitioner Mother appealed to the State of Ohio Board of Education (SOBE), demanding scrutiny with the requirements of State Standards for Special Education. A-6. Six months later, Respondent SOBE ordered the conclusion of its hearing officer affirmed "by a preponderance of the evidence." A-6. Thus this law suit became necessary. The same attorney who had represented Thomas at the local hearing(s) represented both Petitioners in the DistrictCourt. That Court received the transcripts of the local testimony. The Court further received all of the exhibits introduced during the fourteen hearing sessions, and further, it received the correspondence constituting the hearing before the SOBE which this mother had sought, and what had been provided instead. The Court's opinion is at 539 F.Supp.768 (N.D.Ohio1981). Its judment

is filed on 25 Aug. 1981 and included at B-7--9. As the documents at C-10--12 indicate, the attorneys for the local respondents took from the files of the District Court the very documents which the Court of Appeals had asked them to have transmitted. The hearing panel deciding the case on 8 Nov. 1983 had never laid eyes upon the documents which the KCSD used or refused to use in its decisions for Thomas Rettig. The hearing panel had no notion concerning the disposition of the issues by the responsible SOBE. It could not have reviewed the documents that were never placed before it. It simply affirmed the narrow rulings of the District Court, except the issue of extracurricular activities. On remand, the District Court concluded

> This Court therefore determines that its order concerning Rettig's extracurricular activities was appropriate under the Act, the regulation, and Rowley. (E-33).

Please see Appendix 27--34 to determine whether or not that Court reached Statutory and Constitutional issues in its disposition of the matter it considered "moot," and of the matter on extra-curricular services and activities. The Court did not notify the Petitioners of its decision of 26 Jan. 1984. In fact, the docket sheet for our case No. C-79-2234 lists several documents' filing on 9 Feb. 1984 and the filing of the 26 Jan. 1984 decision and final order appears thereafter on the list. By way of receipt of the notice of appeal filed for the KCSD, Petitioners learned of the Court action, and filed a Cross-Appeal, which was dismissed. Petitioners again ask this Court to please review the decisions of the Sixth Circuit Court of Appeals and of this Court found in Appendixes C, D,E,F to make a fair determination whether Petitioners have received full appellate review of the documents in App. A,I,J,K?

Petitioner Thomas Rettig has not received due process and equal protection from Respondents KCSD and SOBE. He was born on 30 May 1965 with infantile autism; however proper diagnosis was not provided until 1974. The syndrome of autism is a behavioral disorder included in the Federal regulations under "seriously emotionally disturbed." 45 C.F.R.121a.5.(8). When the child was five in 1970, his father took him to Respondent Michael Chrin, then and still the Director of Child Study and Special Education for Respondent Kent City School District, requesting placement. The SOBE had Guidelines which permitted enrollment for five year old handicapped children. Chrin refused enrollment. See App. I-51--53. At age six, in 1971, State Standards for Special Education and Legal Dismissal from School Attendance were fully in effect; see App. I-51--64. The actions of Respondent KCSD are found at K-77--80. Neither of

the Standards was implemented; he simply was refused enrollment on the basis of an estimated intelligence quotient and was forced to attend several nursery schools in Akron until 1974. In May 1972, Respondent Chrin requested an evaluation for which the child had to be hospitalized. See K-81. His father gave permission for the release of the information to Chrin, at K-83, and the father testified that he and Chrin discussed these evaluations kept from the eyes of these parents until after the enrollment of Thomas in Kent in 1974. The evaluation placed the child in the educable range of intelligence, albeit he had

> his own "system" of operation. This system works well with his parents (by observation) and with many of the personnel on the ward; i.e. when asked to select an object, picture, etc., Tommy picks every object but the named one. If one follows his eyes--his first response is to the request. When placed in an anxiety situation Tommy quickly responds by 1) crying,. 2) demanding to go to the bathroom, 3) asking for his mother,

> 4) bringing up irrelevant material. The results of the psychological evaluation and speech evaluation indicate that Tommy is currently functioning within the lower level of the educable retarded range of intelligence.

At App. K-85.

None of the placements between 1971 and 74 were in chartered elementary schools under public supervision. Parents provided transportation and tuition. The worst part was they did not properly deal with the child's "system of operation." He was tied to a fire extinguisher mounted in the hall outside his classroom while his teacher ministered to the rest of the class. See Board Exhibit DDD at page 2.

In June 1973 the SOBE amended its Standards for Special Education, J-65--70. Thomas was refused enrollment until April 74. In Jan. 74 he was again hospitialized because of his behavior at the Elms School. This time the psychological evaluation dictated a private placement for behavior modification.

Instead, these parents accompanied their son to St. Louis' Judevine Center for Autistic Children for a three-week training course in creative conditioning. Some treatment program was required. See K-87. The SOBE Standard included at App. J-70 provided for an "educational program" following a prescribed plan reflecting both "educational and treatment components." Respondent KCSD never used such an evaluation report; it never developed such a plan. Its teachers and their numerous uncertified aides and volunteers learned on the job to abuse the child and retard him in all areas of human development. In August 1976, the SOBE promulgated its Standards for Due Process and Procedural Safeguards concerning eligibility, assessment, and placement, providing for a "Placement Team Conference"; see J-71. While a psychological evaluation was done, the KCSD never provided such a required

placement team conference to address the needs of the child in the required way. The parent requests contained in the permission to evaluate and prescribe which are included at App. K-88--89 were refused and the child ignored. See K-97. Further, the State evaluation required a "positive reindorcement or reward system so as to help shape desired behaviors and motivate responses in the teaching situation" -K-96- was designed and implemented despite the 1973 provisions at J-70's "educational program."

In April 1977, the SOBE promulgated its Standards for theIdentification of Handicapped Children and Youth, providing the Ohio definition for "appropriate public education" at App. J-73, requiring a multifactored evaluation uncovering the child's unique educational needs for special education and related services, uncluding, J-74--75, "descriptive evaluation data

shall be compiled from as many of the following areas, and other areas, as deemed necessary for determining the child's educational performance including the learning characteristics and the child's unique educational needs:

a. Medical history and evaluation,
b. Educational and developmental history,
c. Personal/social/emotional functioning,
d. Academic functioning,
f. Vocational/occupational needs,
g. Communication skills,
h. Gross/fine/sensory motor skills,
i. Adaptive behavior.

5. Information provided by the parents shall be considered in the multi-factored eval.

In this case, the "information provided by the parents" was a number of requests for services; See K-88--89. All were denied at K-97--98 by Respondent Chrin. Thomas has never received placement in accordance with the requirements of the definition, including, Standards for Multi-Factored Evaluation, Section (C) and Section (D). See J-73--76.

Respondent SOBE upheld Respondents KCSD and its named employees without verifying compliance with its Standards as in effect at any time, including the 1977 version.

SPECIAL AND IMPORTANT REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. Congress guarantees judicial review under 20 U.S.C. 1415 of administrative decisions made under the Education for All Handicapped Children Act of 1975. See G-43--44. In our cases, the Sixth Circuit Court of Appeals did not provide appropriate judicial review of the documents contained in Appendixes A,I, J and K because "All Exhibits" introduced at the administrative hearings locally and before the SOBE in Columbus were stolen from the files in the Cleveland District Court and never reviewed by the hearing panel. See App. C-10--12. When Petitioners presented their cases again to that Court in 1984, they were dismissed by the hearing panel in 1986. See F-41. Thus, Petitioners have not been accorded their rights to judicial review and turn to this Court.

2. Petitioners believe that the Sixth Circuit Court of Appeals has decided our cases in conflict with applicable decisions of this Court, including Hendrick Hudson Dist.Bd.of Ed. v. Rowley 73 L.Ed 2d 690 providing, at page 694

> 2. In suits brought the Act's judicial-review provisions, a court must first determine whether the State has complied with the statutory procedures, and must then determine whether the individualized program developed through such procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Respondent Kent City School District has not provided for the required evaluation as defined at 121a.500, "the nature and extent of the special education and related services that the child needs..." Instead, it has been enforcing its expressed policy against services. See K-97--98. And no federal court reviewed the documents to determine compliance.

Not judicially reviewing these documents is also in conflict with this Court's decision in Irving Independent School District v. Tatro, 82 L Ed 2d 664, at 666:

> ... In decising cases arising under the Education of the Handicapped Act (20 USC 1400 et seq.), judicial review appropriately extends to the legal question of a school's substantive obligation under the "related services" requirement of 20 USC 1401 (17).

In Tatro, this Court decided the question of CIC for Amber Tatro and required the service for the child under the Act. We believe that a true multi-factored evaluation is basic to the determination of the nature and extent of special education and related services required for Thomas R. if he is to receive educational benefit from his educational career, as is his due.

In Thomas F. Smith, Jr. et al. v. William P. Robinson, Jr., et al, 52 LW 5179, this Court ; in its case no. 82-2120 decided on 5 July 1984, at page 5180:

> (b) As to petitioners' claim that the child was being discriminated against on the basis of his handicapped condition, in violation of the Equal Protection Clause of the Fourteenth Amendment, it is apparent that Congress intended the EHA to be the exclusive avenue through which such a claim can be pursued. The EHA is a comprehensive scheme to aid the States in complying with their constitutional obligations to provide public education for the handicapped...

In our case, the Court of Appeals upheld the District Court's decision that we had failed to prove our "asserted constitutional infringements." App. F-36. Without "All Exhibits" we did not have the opportunity to prove our assertions, presumably the reason for keeping the documents from the eyes of the hearing panel by opposing counsel. When we attempted to prove them again, we were dismissed. F-41. We must turn to this Court for the determination based on Statute and Equal Protection requirements. Without such a determination, Respondent KCSD

will have successfully violated every mandate based on the handicapping conditions of Thomas Rettig. The implications of this miscarriage of justice are enormous for Petitioner Thomas who needs the special education and related services because of those handicapping conditions. They are also enormous for all handicapped children in the jurisdiction of the Sixth Circuit if this Court ignores our Petition. That would indeed be most unfair and very sad.

Further, in Burglington School Committee ... v. Department of Education, 53 LW 4509, this Court decided on 29 April 85 its case No.84-433, at page 4510:

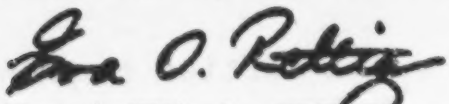
> 1. The grant of authority to a reviewing court under 1415(e)(2) includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act. The ordinary meaning of the language in 1415(e)(2) directing the court to "grant such relief as (it) determines is appropriate" confers broad discretion

> on the court. To deny such reimbursement would mean that the child's right to a free appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards of the Act would be less than complete.

The parents of Petitioner Thomas Rettig have expended substantial sums of money to advise Respondent KCSD of "the nature and extent of special education and related services" needed by him over the years, such as testimony and independent educational evaluations, including the 1984 evaluation by Dr. LaVigna which is included at K-99 ff. Petitioners believe that they are entitled to both the identified services for the student together with compensation for the wrong done unto him, and to reimbursement of the costs to the parents.

For all those reasons, Petitioners pray that this Court grant their Petition and provide an appropriately fashioned remedy.

Respectfully submitted,



(Mrs.) EVA O. RETTIG, pro se

586 Francis Street

Kent, Ohio 44240

(216) 678-0988

FOR THE PETITIONERS

CERTIFICATE OF SERVICE

All Parties required to be served have been served. The original typed copy of this Petition filed in the United States Supreme Court carries the seal and signature of a notary public, as required by S.Ct. Rule 28.5(c).

I acknowledge that I mailed by first class, postage pre-paid, three copies of this Petition for Writ of Certiorary to Dennis Whalen, 565 Wolf Ledges Parkway, P.O.Box 2020, Akron, Ohio 44309-2020; and three copies to B. Douglas Anderson, Asst. Atty. General of Ohio, State Office Tower, 30 E. Broad St., Columbus, OH 43266-1410 this day of May, 1986.

APPENDIXES

APPENDIXES

Board of Education Exhibit BBB

March 1, 1978

The Kent Public Schools: Supt. of Instruction

Pres. of Board of Education

At the regular board meeting on Monday, Feb. 27, 1978 I did formally, and in front of many witnesses, request an Impartial Due Process Hearing.

I had called the Asst. Supt. of Kent Schools on Feb. 21, 1978 requesting my name be placed on the Agenda of the Board Meeting.

Why was my name not placed on the Agenda?

1. I hereby formally request again an impartial due process hearing regarding the provision of free appropriate public education in the least restrictive placement of my son Thomas M. Rettig.
   I am dissatisfied with my son's education as it is presently provided.
2. I respectfully request a copy of each page and of every page, note, entry,

etc. of <u>all</u> school records regarding my son. I am prepared to pay for the actual cost.

In view of the fact that I have been very reasonable and patient in reaching a final decision in the matter, I ask the Kent Schools to move as quickly as possible. The child is 13 years old and has needed more help from the time he was born with early infantile autism.

(signed)
Eva Rettig

HEARING OFFICER
EXHIBIT # 2

ISSUES

1. The evaluation and testing procedures used by the Kent Public School System violates Ohio Revised Code Section 3323.03, 20 U.S.C. 1412 (5)(C)(The Education of the Handicapped Act) 29 U.S.C. 794 (Rehabilitation Act of 1973) and the administrative guidelines and regulations adopted under these laws.

2. The Kent City School System is failing to provide a free appropriate public education as mandated under Ohio Revised Code Section 3323.02, 20 U.S.C. 1412 (2)(B)(Education of the Handicapped Act) and 29 U.S.C. 794 (Rehabilitation Act of 1973) and the administrative guidelines and regulations adopted under these laws. Specific violations being complained of are: .....

C. Failure to provide opportunities to Thomas M. Rettig for the nonacademic and extracurricular services and activities by theKent City School District.

OHIO DEPARTMENT OF EDUCATION
Impartial Due Process Hearing

In the matter of:

THOMAS MATTHIAS RETTIG

and

KENT CITY SCHOOL DISTRICT

DECISION OF DAVID P. FREED
IMPARTIAL HEARING OFFICER

.....

VI.

CONCLUSION

On each of the issues presented herein, the hearing officer has found that the Kent City School District has met its burden in proving by a preponderance of the evidence that it is providing a free and appropriate public education for Tommy Rettig. ...

BEFORE THE OHIO STATE BOARD OF EDUCATION

In the Matter of the

Educational Program for

Thomas Matthias Rettig

REPORT OF REFEREE

September 28, 1979

An additional issue which the parents seek to raise for the first time upon this appeal is whether the Kent City School District has been in full compliance with the statutes and standards relating to special education for handicapped children from 1970 to the present time. With respect to that issue, the parents request the State Board to compel the production of the following documents and additional evidence:

1. - 19 (pages 5,6,7) ...

RESOLUTION ON STATE LEVEL REVIEW OF THE IMPARTIAL DUE PROCESS HEARING FOR THOMAS MATTHIAS RETTIG

.....

WHEREAS the Referee's report is incorporated herein by reference and recommends that the State Board of Education issue a final order:

1. Affirming the conclusion of the impartial hearing officer that the Kent City School District has met its burden of proving by a preponderance of the evidence that it is providing a free and appropriate public education for Thomas M. Rettig;

....

RESOLVED, That the recommendations of Referee William L. Clark are approved; ...

I certify that the foregoing is a true and correct copy of the action taken by the State Board of Education at its meeting on November 12, 1979.

Columbus, Ohio
January 9, 1980

(signed)
Franklin B. Walter, Secretary

FILED
1981 Aug. 25 PM 5:06

JUDGEMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Thomas M. Rettig, et al.	)	CIVIL
	)	ACTION
Plaintiffs	)	FILE
	)	NO.
vs.	)	C 79-
	)	2234
Kent City School District, et al.	)	
	)	JUDGMENT
Defendants	)	

This action came on trial (hearing) before the Court, Honorable Ann Aldrich, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered, in favor of the plaintiffs in part and in favor of the defendants in part.

It is Ordered and Adjudged that the State Defendant immediately revise its standard, 3301-51-16(D)(5)(b) so as to comply with the federal regulation.

IT IS FURTHER ORDERED that the defendant School District conduct a multi-

factored evaluation in strict compliance with 45 C.F.R. Section 121a.532. That evaluation will be incorporated in the new IEP to be formulated for the 1981-82 school year. The Rettigs and an expert of their choice may participate in the development of that IEP.

IT IS FURTHER ORDERED that the Kent City School District provide at least one hour per week of extracurricular activities for Thomas Rettig in accordance with the new IEP.

IT IS FURTHER ORDERED that plaintiffs' request that the defendant School District be ordered to continue to provide Thomas Rettig with a free and appropriate education for seven additional years from age 22 to 29 is hereby denied.

IT IS FURTHER ORDERED that each party shall bear their own counsel fees and costs.

IT IS FURTHER ORDERED that the court's opinion and order filed on August 25, 1981 is hereby adopted as findings of fact and conclusions of law, in accordance with Rule 52, Federal Rules of Civil Procedure.

Dated at Cleveland, Ohio, this 25th day of August, 1981.

(signed)

ANN ALDRICH, U.S. DISTRICT JUDGE

LAW OFFICES

McDOWALL & WHALEN

P.O. BOX 8
135 PORTAGE TRAIL
CUYAHOGA FALLS, OHIO 44222

...

G. FREDERICK COMPTON,JR.

...

R. BRENT MINNEY

October 9, 1981

David Benik, Deputy Clerk
Clerk of Courts
United States District Court
Cleveland, OH 44114

Re: Thomas Rettig, et al. v. Kent City School District, et al
District Court No. C79-2234
Court of Appeals No. 81-3586

Dear Mr. Benik:

Today I spoke with Miss Kathy Preuitt, Deputy Clerk, of the United States Court of Appeals, Sixth Circuit, concerning the above-captioned matter. During the proceedings of the above-captioned matter in Judge Aldrich's Court, counsel and the

Court referred to the administrative record that was filed with the Court as an exhibit. It is my understanding, after speaking with Judge Aldrich's Court, that the administrative record was not sent to Cincinnati as part of the record. Miss Preuitt suggested that I request that you transmit all of the administrative record and exhibits to Cincinnati. This is based upon the fact that the administrative record and exhibits contain evidence upon which the Court relied in rendering its decision. Please advise the undersigned when the transmission of the administrative record and exhibits has been accomplished. Miss Preuitt suggested that if there is any question or problem that you contact her directly. ...

Very truly yours,

DENNIS M. WHALEN CO.,L.P.A.
(signed) G. Frederick Compton, Jr.
Attorney at Law

cc: Miss Kathy Preuitt, Deputy Clerk
Dr. Donna G. Lightel, Superintendent

D. C. Form No. 22

No. C79-2234

United States District Court

NORTHERN DISTRICT OF OHIO

THOMAS RETTIG

vs.

KENT CITY SCHOOL DISTRICT

RECEIPT FOR FOLLOWING PAPERS

All Exhibits

FILED
1981 OCT 19 AM 10:18
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

The above papers taken from the files by

R. Brent Money

attorney for Kent City Schools

Dated Oct. 19, 1981

To be returned within _____ days.

Allowed:

District Judge.

C-12

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 81-3586, 81-3595

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THOMAS M. RETTIG, et al.
Plaintiffs-Appellants, Cross-Appellees,

v.

KENT CITY SCHOOL DISTRICT,
Defendant-Appellee, Cross-Appellant,

and

KENNETH CARDINAL, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed November 8, 1983

Before: LIVELY, Chief Circuit Judge; KRUPANSKY, Circuit Judge; and FEIKENS, District Judge*.

KRUPANSKY, J. This is an appeal and cross-appeal from the final order of the District Court for the Northern District of Ohio in this action involving the education of a handicapped child.

---

* The Hon. John Feikens, United States District Judge for the Eastern District of Michigan, sitting by designation.

D-13

The district court entered extensive findings of fact below and reference is made to that opinion for a full exposition of the background of this controversy. *See, Rettig* v. *Kent City School District*, 534 F. Supp. 768 (N.D. Ohio 1981). It is sufficient to restate here that Thomas M. Rettig (Thomas) is a severely handicapped teen-age child. Thomas displays symptoms of autism and is also believed to be mentally retarded.

In February of 1978 Thomas' parents requested a due process hearing pursuant to the Education for All Handicapped Children Act of 1975 (EHCA or Act) 20 U.S.C. § 1401 *et seq.*, questioning the quality of the education their son was receiving. A hearing was conducted before a Hearing Officer in accordance with § 1415(b)(2) of the Act. The Hearing Officer decided in favor of the Kent City School District and issued a comprehensive opinion on April 30, 1979. It was affirmed by the State Board of Education.

The initial complaint in this matter was filed in the District Court for the Northern District of Ohio on November 30, 1979. The complaint joined Thomas and his mother as parties plaintiff and named the Kent City School District as defendant. Plaintiffs, in the initial complaint, essentially petitioned for review of the state decision pursuant to 20 U.S.C. § 1415(e)(2),[1] and also asserted violations of the Rehabilitation Act of 1973, 29 U.S.C. § 794. An amended complaint incorporated additional allegations of constitutional infringements under 42 U.S.C. § 1983 and joined, as defendants, the

[1] 20 U.S.C. § 1415(e)(2) provides that any party aggrieved by the resolution of an administrative hearing under the Act:

> shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

D-14

superintendent of the Kent City School District, the director of special education for the district, the State Board of Education of Ohio and the state superintendent of education.

The lower court, subsequent to duly conducted hearings in August of 1980, denied plaintiffs' request for a preliminary injunction. The trial court issued its final order in May of 1981, subsequent to a trial of the case on its merits.

The trial court upheld the administrative Hearing Officer's decision, concluding that: (a) the defendants had provided adequate inservice training for faculty and staff; (b) the defendants had devised and implemented a reasonable educational program for Thomas which would not be modified; (c) a twelve month educational program for Thomas was not required under the Act; and (d) continuous occupational therapy for Thomas was not a requiremennt of the Act.

The lower court did, however, direct the Kent City School District to provide Thomas with one hour of extracurricular activities each week and further decreed that the State Board of Education amend its rules to conform with federal regulations.[2] The lower court concluded, as a matter of fact, that plaintiffs had failed to prove their constitutional infringements. It also characterized the plaintiffs' claims arising under the Rehabilitation Act as merely restatements of EHCA charges and disposed of those charges by incorporating them into its resolution of the latter. Finally, the lower court declined to award attorney fees.

The plaintiffs appealed the trial court's decision insisting that Thomas was being denied a free appropriate education. The Kent City School District cross-appealed from the lower court's order mandating the district to provide Thomas with one hour of extracurricular activities each week. The State revised its regulations in accordance with the lower court's

[2] Federal regulations mandate a final disposition of all appeals from decisions of Hearing Officers within 30 days of issuance thereof. 34 C.F.R. § 300.512 (1982). The State rules permitted a 60-day interval.

order and did not appeal. *See* O.A.C. § 3301-51-02 (6)(12)(f).

Initially, we conclude that the lower court's findings with respect to the constitutional claims are not clearly erroneous and we affirm the court's ruling as to those claims. This Court also agrees that, in this case, the plaintiffs' complaints purportedly arising under the Rehabilitation Act, with one exception, are resolved by the disposition of the EHCA claims. *See* 34 C.F.R. §§ 104.33, 104.36 (1982). Accordingly, this Court is confronted with only those issues joined under the EHCA. In considering the asserted violations of the EHCA the Court is directed to the Supreme Court's recent explication of the Act.

In *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, — U.S. —, 102 S.Ct. 3034 (1982), the Supreme Court reviewed the policies, procedures and objectives of the Act. It also specifically identified and delimited a court's obligation in actions instituted pursuant to § 1415(e)(2). The Court stated:

> [A] court's inquiry in suits brought under § 1415(e)(2) is two-fold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Id. at —, 102 S.Ct. at 3051 (footnotes omitted).

Plaintiffs urge that both inquiries should be answered in the negative. In addressing the procedural requirements of the Act the plaintiffs assert that the State failed to develop adequate programs for inservice training of teachers and support personnel as directed by the EHCA.

D-16

The EHCA specifically requires a State participating under the Act to submit a plan incorporating, *inter alia*:

> a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, . . .

The district court found that the defendants had developed and implemented a wide range of inservice training programs which satisfied the requirements of the EHCA. That conclusion is supported by the record.

Plaintiffs have argued, however, that parents should be included within the meaning of "support personnel" and therefore the Kent City School District was obliged to provide inservice training to the parents of Thomas. The legislative history, however, discloses that Congress intended the term "support personnel" to denote professional staff employed by the school system. The Senate Report, in discussing the Act's provision regarding inservice training, stated, in pertinent part:

> High quality educational services for all handicapped children will require a greater number of support personnel, as well as teachers. The supportive services should be provided by trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel.

S. Rep. No. 94-168, 94th Cong., 1st Sess. 34, *reprinted in* [1975] U.S. Code Cong. & Ad. News, 1425, 1457. Accordingly, plaintiffs' contention that "support personnel" should include parents is unfounded and this Court concludes that defendants provided adequate inservice training under the terms of the EHCA.

The plaintiffs have challenged the quality of the educational program developed for Thomas in several respects.

In sum, however ,the plaintiffs' arguments merely reflect a difference of opinion as to the most effective teaching methods available to advance Thomas' education. Various experts testified as to an appropriate educational program for Thomas. The courts, however, are not free to choose between competing educational theories and impose that selection upon the school system. As the Supreme Court admonished in *Rowley, supra* at —, 102 S.Ct. at 3051-52:

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." § 1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to § 1415(e)(2).
>
> We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 42, (1973). We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once

> a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

(footnotes omitted). This Court is of the opinion, therefore, that the lower court was correct in refusing to interfere with the State's implementation of its educational program as it related to Thomas. To the extent the plaintiffs' requested the trial court to order the school district to include specific programs within Thomas' curriculum – for example, summer classes and continuous occupational therapy – this Court affirms the district court's denial of such relief inasmuch as the programs were not necessary to permit Thomas to benefit from his instruction.[3]

The trial court ruled in favor of the plaintiffs in addressing the issue of Thomas' extracurricular activities. In granting this relief, the trial court relied on the following administrative regulation promulgated under the Act:

> § 300.306 Non-academic services.
>
> (a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

34 C.F.R. § 300.306 (1982).[4] The regulation apparently

---

[3] The lower court also ordered the School District to conduct a multi-factored evaluation of Thomas. The School District, in fact, had attempted to perform such an evaluation but his parents objected, charging that the basis of norm-referenced or standardized testing was inappropriate for autistic children. The evidence disclosed however that such testing was an important component of an overall evaluation. It was, therefore, reasonable to require the parents of Thomas, as a condition to receiving benefits under the Act, to permit the school district to perform an evaluation of Thomas. *See, Vander Malle* v. *Ambach*, 673 F.2d 49 (1982).

[4] The regulation was initially promulgated by the Secretary of Health, Education and Welfare and appeared at 45 C.F.R. § 1210.306. However, the functions of the Secretary of Health, Education and

adopts a standard designed to ensure that handicapped children are exposed to extracurricular activities on an equal basis with non-handicapped children.

In *Rowley*, however, the Supreme Court specifically rejected a construction of the EHCA which required "that States maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'" *Rowley, supra* at —, 102 S. Ct. at 3042, *quoting*, 483 F. Supp. at 534.

The regulation and the lower court's opinion antedated the Supreme Court's opinion in *Rowley*. This Court therefore deems it appropriate to remand this issue to the district court for further consideration in light of the pronouncements in *Rowley*.[5]

In accordance with this opinion, the judgment below is AFFIRMED in all respects except that portion requiring the school district to provide extracurricular activities to Thomas which is VACATED and REMANDED for further consideration.[6] Each party shall pay its own costs.

Welfare with respect to the Act were transferred to the Secretary of Education. Pub. L. No. 96-88 § 601, 93 Stat. 696. The regulation in issue, along with scores of others, was thereafter transferred to Title 34 and redesignated. 45 Fed. Reg. 77368 (1980).

[5] This last issue is the exception previously alluded to wherein application of the Rehabilitation Act could provide a resolution different from that achieved by application of the EHCA. *See* 34 C.F.R. § 104.37 (1982). The lower court is free to address this issue on remand.

[6] *Amicus curiae* has briefed the issue of attorney fees. In light of the remand, the attorney fee issue is not ripe for final resolution.

FILED
JAN 3 1984
JOHN P. HEHMAN, Clerk

Nos. 81-3586, 81-3595

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THOMAS M. RETTIG, et al.,

Plaintiffs-Appellants, Cross-Appellees,

v.

KENT CITY SCHOOL DISTRICT,

Defendant-Appellee, Cross-Appellant,

and

KENNETH CARDINAL, et al.,

Defendants-Appellees

ORDER

BEFORE: LIVELY, Chief Circuit Judge; KRUPANSKY, Circuit Judge; and FEIKENS, District Judge*

Upon due consideration, the Court concludes that rehearing in this matter is not warranted and, accordingly, the appellants' motion is hereby denied.

ENTERED BY ORDER OF THE COURT

(signed)
Clerk

*Hon. John Feikens, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

D-21

FILED
FEB 7 1984
JOHN P. HEHMAN, Clerk

Nos. 81-3586, 81-3595

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS M. RETTIG, et al.,	)	
	)	
Plaintiffs-Appellants, Cross-Appellees,	)	
	)	
v.	)	ORDER
	)	
KENT CITY SCHOOL DISTRICT,	)	
	)	
Defendant-Appellee, Cross-Appellant	)	
and	)	
KENNETH CARDINAL, et al.,	)	
	)	
Defendants-Appellees.	)	

BEFORE: LIVELY, Chief Circuit Judge; KRUPANSKY, Circuit Judge; and FEIKENS, District Judge*

Appellant's motion for reconsideration of the Court's order denying rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

(signed)
CLERK

* Hon. John Feikens, Chief Judge, United States District Court of the Eastern District of Michigan, sitting by designation and assignment.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

February 16, 1984

Ms. Eva O. Rettig
586 Francis Street
Kent, Ohio 44240

Re: Case Nos. 81-3586
and 81-3595
Thomas M. Rettig; Eva O. Rettig vs. Kent City School District, et al
Dist.Ct.No.C79-2234

Dear Ms. Rettig:

I am returning herewith, as unfiled, the motion by Thomas M. Rettig for a rehearing. Please be advised that the mandate of this Court was issued on February 15, 1984, pursuant to Rule 41(a), Federal Rules of Appellate Procedure. Therefore, this Court no longer has jurisdiction in this matter.

Very truly yours,

John P. Hehman, Clerk

(signed)
By: (Mrs.) Cathy Weber
Deputy Clerk

Enclosures
cc: Mr. Edward G. Kramer
Mr. Dennis M. Whalen
Mr. Gary E. Brown

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

February 20, 1984

Ms. Eva Rettig
586 Francis Street
Kent, Ohio 44240

Re: Case Nos. 81-3586
and 81-3595

Thomas M. Rettig; Eva O. Rettig vs. Kent City School District, et al.

Dist.Ct.No. C79-2234

Dear Ms. Rettig:

I am returning herewith the documents received from you on February 17, 1984. The mandate of this Court has issued and therefore this Court no longer has jurisdiction in this matter.

Very truly yours,

John P. Hehman, Clerk

(signed)

BY: (Mrs.) Cathy Weber
Deputy Clerk

Enclosures

D-24

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 21, 1984

Mr. Thomas M. Rettig
586 Francis Street
Kent, OH 44240

Re: Thomas M. Rettig v. Kent City School District, et al.
No. 83-6494

Dear Mr. Rettig:

The Court today entered the following order in the above entitled case:

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

Very truly yours,

Alexander L. Stevas, Clerk

(sig. stamp)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 18, 1984

Mr. Thomas M. Rettig
586 Francis Street
Kent, OH 44240

Re: Thomas M. Rettig, v. Kent City School District, et al.

No. 83-6494

Dear Mr. Rettig:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Very truly yours,

Alexander L. Stevas, Clerk

(sig. stamp)

D-26

FILED
1984 JAN 26
PM 2:31

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS M. RETTIG, et al.	Civil Action
Plaintiffs	No. C79-2234
vs.	MEMORANDUM
KENT CITY SCHOOL DISTRICT, et al.	AND
Defendants	ORDER

ALDRICH, J.

This matter came before the Court for judicial review of administrative hearings held by the State of Ohio concerning the education of Thomas M. Rettig, a handicapped child, as authorized by provisions of the Education for All Handicapped Children Act of 1975 ("Act"), 20 U.S.C. 1401 et seq. After a trial to the bench, theCourt issued an Opinion on August 25, 1981, in which it ordered the Kent City School District ("District") to make certain changes in its Individualized Education Program ("IEP") for Rettig for the 1981-82 academic year. The

complicated and unhappy history of this dispute is set forth in that opinion. Rettig v. Kent City School District, 539 F.Supp. 768 (N.D. Ohio 1981).

Both parties appealed to the United States Court of Appeals for the Sixth Circuit. Affirming this Court on all other issues, the three-judge panel remanded for further consideration only the question of whether the Court's order that the District provide Rettig with at least one hour of extracurricular activities per week remained appropriate in light of Board of Education of the Hendrick Hudson School District v. Rowley, __U.S.___,102 S.Ct. 3034 (1982). See Rettig v. Kent City School District, __F.2d___(6th Cir. Nov. 8, 1983).

Upon consideration, the Court finds that the relief granted in its original opinion comports with the standards set

forth in Rowley. In addition, the Court finds that any alteration of the relief provided in the Opinion would be improper, since the Court's decision concerned a subject matter--the 1981-82 IEP-- which is now moot.

I. ROWLEY ANALYSIS

The Court's order that the District provide Rettig with extracurricular activities rested on a regulation promulgated by the Department of Health and Human Services pursuant to the Act. Title 34 U.S.C. 300.306[1] provides:

> (a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such a manner as is necessary for participation in those services and activities.

The Court found that

> ... the education that Tom received between 1976 and 1979 was primarily a classroom experience. In conjunction with the classroom experi-

[1]At the time of the Court's opinion, the same regulation was codified at 45 C.F.R, 121a.306.

> ence, the Kent City School District did not provide any after school activities in which a child like Thomas Rettig might participate, although the School District did provide such activities for its non-handicapped students. It therefore failed to provide after school activities on an equal basis, and has been in violation of (the regulation).

539 F.Supp. at 780.

Neither the regulation nor this Court's interpretation of it violate the letter or spirit of Rowley. Reversing a district court order requiring that a school district provide a sign-language interpreter for a deaf student, Amy Rowley, the Supreme Court rejected her

> ... contention that "the goal of the Act is to provide each handicapped child with an equal educational opportunity."...The requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximizr each child's potential "commensurate with the opportunity provided other children."... Congress sought "to provide assistance to the States in carrying out their responsibilities under ... the Constitution of the United States to provide equal protection of the laws."

... But we do not think that such statements imply a congressional intent to achieve strict equality of opportunity or services.

... The requirement that States provide "equal" educational opportunities would thusseem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require on the other hand, thefurnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

103 S.Ct. at 3046-47 (citations omitted).

The Court concluded:

... The District Court found that the "evidence firmly establishes that Amy is receiving an 'adequate' education..." In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated by the ... school administrators to meet her educational needs, the

> lower courts should not have concluded that the Act requires the provision of a sign-language interpreter.

Id. at 3052.

This Court's order concerning Rettig's extracurricular activities does not violate Rowley. We did not read the requirement of 34 C.F.R. 300.306(a) that the District "afford handicapped children an equal opportunity for participation" to mandate "strict equality of opportunity or services" eschewed by Rowley. Rather, this Court sought to rectify a situation in which the District had failed to "provide any after school activities in which a child like Thomas Rettig might participate..." Ordering the District to provide Rettig with at least one hour per week of extracurricular activities did not seek to force it to provide services "sufficient to maximize (Rettig's) potential 'commensurate with the opportunity provided other children.'" 102 S.Ct. at

3046. The order simply sought to provide him with the "free appropriate public education" that is indisputably the subject matter of the Act. Id. at 3047.

This Court therefore determines that its order concerning Rettig's extracurricular activities was appropriate under the Act, the regulation, and Rowley.

II. MOOTNESS

Under Article III of the Constitution, this Court sits to decide "Cases" and "Controversies" and may not issue advisory opinions on abstract questions. The doctrine of "mootness", which prevents courts from hearing actions that no longer present a justiciable issue, has two aspects: "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969); see generally United States Parole Commission

v. Geraghty, 445 U.S. 388, 396 (1980); DeFunis v. Odegaard, 416 U.S. 312 (1974).

This matter came before the Court for judicial review of administrative hearings concerning Rettig's IEP for the 1981-82 academic year. The controversy over that plan cannot be considered a "live" one. Indeed, to amend at this time the IEP for a school year long since concluded would be, as it were, the very essence of mootness.[2]

The Clerk is instructed to close the file to No. C79-2234.

IT IS SO ORDERED.

(signed)
ANN ALDRICH
UNITED STATES DISTRICT
JUDGE

[2]Rettig recently commenced a new action against the District challenging the education it has provided him in the school years since 1981-82. See Rettig v. Kent City School District, No. C83-2881 (N.D. Ohio filed July 15, 1983). (Lambros, J.).

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-3167, 84-3187

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THOMAS M. RETTIG; EVA O. RETTIG, *Plaintiffs-Appellees, Cross-Appellants,* v. KENT CITY SCHOOL DISTRICT, ET AL., *Defendants-Appellants, Cross-Appellees.*	ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed March 10, 1986

Before: KRUPANSKY and MILBURN, Circuit Judges; and JOINER, District Judge*.

KRUPANSKY, Circuit Judge. Appellant-Cross Appellee Kent City School District and Appellees-Cross-Appellants Thomas and Eva Rettig appeal from the district court's final order in this action which was initiated pursuant to the Edu-

*Hon. Charles W. Joiner, District Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

F-35

cation for All Handicapped Children Act of 1975. (EHCA or Act) 20 U.S.C. § 1401 *et seq.*

Thomas Rettig (Thomas) is a twenty year old handicapped child who manifests symptoms of autism. Thomas has, for a number of years, and is currently receiving special education services in the Kent City School District. He will continue to receive this special education until he is twenty-two years of age.

In February of 1978, Thomas' parents (Rettigs) requested a due process hearing pursuant to the EHCA, questioning the validity of the special education their son was receiving in the Kent City School District. In a comprehensive opinion dated April 30, 1979, a state-appointed impartial hearing officer concluded that the Kent City School District was providing Thomas with a "free appropriate public education" as required by the Act. The State Board of Education affirmed the hearing officer's opinion.

Thereafter, Thomas and his mother, Eva O. Rettig, commenced this action seeking review of the state decision pursuant to 20 U.S.C. § 1415(e)(2), asserting violations of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and alleging constitutional infringements pursuant to 42 U.S.C. § 1983. After a trial on the merits, the district court upheld the administrative hearing officer's decision and concluded that the plaintiffs had failed to prove their asserted constitutional infringements. The lower court did, however, direct the Kent City School District to incorporate one hour of extra-curricular activities each week in Thomas' 1981-82 Individualized Educational Plan (IEP).

The Rettigs appealed the trial court's decision, insisting that Thomas was being denied an appropriate free education. The Kent City School District cross-appealed from the lower court's order mandating the district to afford Thomas one hour of extra-curricular activities per week. This court vacated that part of the district court's judgment concerning

the extra-curricular activities to be made available to Thomas each week and remanded that single issue to the trial court for further consideration in light of the Supreme Court's decision in *Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). In all other respects, this court affirmed the district court's judgment.

On January 26, 1984, the district court decided that the matter had become moot as it concerned Thomas because the earlier order granted relief for a time period, the 1981-82 school year, which had "long since concluded", but nonetheless, reaffirmed its earlier decision ordering one hour of extra-curricular activities per week. This appeal and cross-appeal followed.

Of initial concern to this court is the threshold issue of subject matter jurisdiction. Article III grants the federal courts jurisdiction over cases and controversies. To satisfy the case or controversy requirement, an actual controversy must exist at all stages of review, and not simply on the date the action is initiated. *Roe v. Wade,* 410 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147 *reh'g denied,* 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973).

The issue of mootness must, however, be considered by applying the doctrine of "capable of repetition, yet evading review" as enunciated in *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911).

The capable-of-repetition rule applies in exceptional situations where the named plaintiff can support a reasonable showing that he will be again subjected to the complained of conduct. *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) *citing DeFunis v. Odegaard,* 416 U.S. 312, 319, 94 S.Ct. 1704, 1707, 40 L.Ed.2d 164 (1974).

In *Board of Education of the Hendrick Hudson School District v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690

(1982), the Supreme Court reviewed, under the provisions of the EHCA, a handicapped child's IEP for a schoolyear that had previously expired. Noting that the protracted period required to exhaust judicial review in most instances exceeds nine months, the Court stated that a federal court retained jurisdiction to grant relief pursuant to the EHCA where the alleged deficiences in the IEP were "capable of repetition *as to the parties before it* yet evading review." *Rowley,* 458 U.S. at 186 n. 9 (emphasis added).

As a handicapped child, Thomas is entitled to a public education under Ohio law until he attains the age of twenty-two. *See, e.g.,* Ohio Rev. Code §§ 3323.01(A) and 3323.07. At oral argument, counsel for the Kent City School District indicated that the school district would comply with the mandate of the Ohio statute. Accordingly, the issue of providing Thomas with one hour of extracurricular activities each week for the period of the School District's statutory mandate remains a viable issue that is capable of repetition, yet evading review. Because this case falls within a clearly defined exception to the mootness doctrine, this court invokes its jurisdiction to consider the substantive issue presented herein.

In disposing of the merits joined by this Court's mandate of August 25, 1981, the district court reaffirmed its previous order requiring that Thomas be afforded one hour of extra-curricular activities per week and concluded that its earlier disposition of the issue was correct and came within the pronouncements of the Supreme Court's decision in *Board of Education of the Hendrick Hudson School District v. Rowley,* 458 U.S. 176, 203, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982).

The district court reasoned that 34 C.F.R. § 300.306, the regulation which addresses the subject of extra-curricular activities, was valid under *Rowley.* That regulation provides:

> (a) Each public agency shall take steps to provide nonacademic and extra-curricular services and

> activities in such manner as is necessary to afford handicapped children an *equal opportunity for participation in those services and activities.*
>
> (b) Nonacademic and extra-curricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

The school district, however, argues that the regulation is invalid pursuant to the teachings of *Rowley* insofar as it mandates "equal opportunity" for participation in extra-curricular activities.

In *Rowley,* the parents of a deaf child brought suit under the EHCA insisting that their daughter should have been provided with a qualified sign language interpreter in all of her academic classes. Although the trial court found that the child was performing better than the average child in her class, it nonetheless concluded that the child had not been receiving a "free appropriate public education" because she had not been performing as well academically as she would have if she were not deaf. The Supreme Court reversed the judgment of the district court, concluding that the EHCA did not mandate state public education systems to ensure that each handicapped child be provided with special education services which maximize the handicapped child's potential commensurate with the opportunity provided to other children.

The *Rowley* Court indicated that by enacting the EHCA, "Congress sought primarily to identify and evaluate handicapped children and to provide them with access to a free public education." 458 U.S. at 200. The Court reasoned that a state could meet its obligation to provide a handicapped

child with a free appropriate public education "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203. The Court further said that a handicapped child's IEP met the Act's substantive standards when it was "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207.

After declaring that Congress had not intended to achieve "strict equality of opportunity or services" through the EHCA, the Court opined:

> The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

Id. at 198-99. Accordingly, the Act does not absolutely require that a handicapped child be provided each and every special service available to non-handicapped children.

Rather, the applicable test under *Rowley* is whether the handicapped child's IEP, when taken in its entirety, is reasonably calculated to enable the child to receive educational benefits.

34 C.F.R. § 300.306, relied upon by the district court to mandate "an equal opportunity for participation in ... [extra-curricular] activities", requires strict equality of opportunity, and accordingly is in conflict with the pronouncements of *Rowley*.

Plaintiffs argue that the extra-curricular requirement imposed by the district court can be independently supported because the requirement was necessary to permit Thomas to benefit from his educational program. The Rettigs contend that Thomas' "free appropriate public education" should include activities required to assist him to "benefit from special education." 20 U.S.C. § 1401(17). However, the state appointed hearing officer determined that because of Thomas' "sporadic and recurring behavior, including, regurgitation, lack of interest, self-stimulating activities and bladder accidents," he was unable to significantly benefit from extra-curricular programs. Accordingly, the school district was not obligated to provide extra-curricular activities from which Thomas would receive no significant educational benefit.

In their cross-appeal, the plaintiffs advance several issues that were fully litigated in the 1981 district court proceedings and have been previously resolved on appeal to this court and the United States Supreme Court. Accordingly, the Rettigs' cross-appeal is hereby dismissed.[1]

---

[1]On March 12, 1985, the Kent City School District filed a motion to strike the joint appendix filed by the Rettigs and for leave to file a supplemental appendix. In an order dated May 2, 1985, this court denied the motion to strike, granted the school district leave to file a supplemental appendix, and referred to this panel defendant's motion to assess the costs of preparing the supplemental appendix to the Rettigs. Because the relevant documents contained in the supplemental appendix were also incorporated in the joint appendix, defendants' motion is hereby overruled.

For the reasons stated herein, the judgment of the district court is REVERSED.

"(f) Notwithstanding the provisions of subsection (a)(2)(B)(ii), any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 611(d) for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

"PROCEDURAL SAFEGUARDS

SC 1415. "SEC. 615. (a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

"(b)(1) The procedures required by this section shall include, but shall not be limited to—

"(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

"(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

"(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

"(i) proposes to initiate or change, or

"(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

"(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

"(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

ing. "(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

"(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

"(d) Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 613(a)(12)).

"(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

Civil action.

"(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

"(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

District courts jurisdiction.

"(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

"WITHHOLDING AND JUDICIAL REVIEW

Notice, hearing. 20 USC 1416.

"SEC. 616. (a) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds—

"(1) that there has been a failure to comply substantially with any provision of section 612 or section 613, or

"(g)(1) If the sums appropriated for any fiscal year for making payments to States under this part are not sufficient to pay in full the total amounts which all States are entitled to receive under this part for such fiscal year, the maximum amounts which all States are entitled to receive under this part for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

"(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full the total of such maximum amounts under the last sentence of such paragraph, the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available to the local educational agency or intermediate educational unit under the provisions of subsection (d), which it estimates that it will expend in accordance with the provisions of this part. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies or intermediate educational units, in the manner provided by this section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

"ELIGIBILITY

"SEC. 612. In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

"(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

"(2) The State has developed a plan pursuant to section 613(b) in effect prior to the date of the enactment of the Education for All Handicapped Children Act of 1975 and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

"(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

"(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such require-

ments would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

"(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

"(D) policies and procedures are established in accordance with detailed criteria prescribed under section 617(c); and

"(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

"(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

"(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 614(a)(5).

"(5) The State has established (A) procedural safeguards as required by section 615, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

"(6) The State educational agency shall be responsible for assuring that the requirements of this part are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. Administrati

"(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

"(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

"(c) It is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.".

Ante, p. 773.

(b) The heading for section 601 of the Act (20 U.S.C. 1401) is amended to read as follows:

"SHORT TITLE; STATEMENT OF FINDINGS AND PURPOSE".

DEFINITIONS

SEC. 4. (a) Section 602 of the Act (20 U.S.C. 1402) is amended—

20 USC 1401.

(1) in paragraph (1) thereof, by striking out "crippled" and inserting in lieu thereof "orthopedically impaired", and by inserting immediately after "impaired children" the following: ", or children with specific learning disabilities,";

(2) in paragraph (5) thereof, by inserting immediately after "instructional materials," the following: "telecommunications, sensory, and other technological aids and devices,";

(3) in the last sentence of paragraph (15) thereof, by inserting immediately after "environmental" the following: ", cultural, or economic"; and

(4) by adding at the end thereof the following new paragraphs:

"(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

"(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

"(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5).

Subpart E—Procedural Safeguards

Due Process Procedures for Parents and Children

§ 121a.500 Definitions of "consent", "evaluation", and "personally identifiable".

"Evaluation" means procedures used in accordance with §§ 121a.530–121a.534 to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

"Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

Protection in Evaluation Procedures

§ 121a.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.530–121a.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(20 U.S.C. 1412(5)(C).)

§ 121a.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special education program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of § 121a.532.

(20 U.S.C. 1412(5)(C).)

§ 121a.534 Reevaluation.

Each State and local educational agency shall insure:

(a) That each handicapped child's individualized education program is reviewed in accordance with §§ 121a.340–121a.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under § 121a.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

(20 U.S.C. 1412(5)(c).)

§ 121a.532 Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(20 U.S.C. 1412(5)(C).)

Comment. Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

45 CFR 121a.
Effective: Oct. 1, 1977

Subpart C—Services

Free Appropriate Public Education

§ 121a.300 Timelines for free appropriate public education.

(a) *General.* Each State shall insure that free appropriate public education is available to all handicapped children aged three through eighteen within the State not later than September 1, 1978, and to all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Age ranges 3–5 and 18–21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to handicapped children aged three, four, five, eighteen, nineteen, twenty, and twenty-one:

(1) If State law or a court order requires the State to provide education for handicapped children in any disability category in any of these age groups, the State must make a free appropriate public education available to all handicapped children of the same age who have that disability.

(2) If a public agency provides education to non-handicapped children in any of these age groups, it must make a free appropriate public education available to at least a proportionate number of handicapped children of the same age.

(3) If a public agency provides education to 50 percent or more of its handicapped children in any disability category in any of these age groups, it must make a free appropriate public education available to all of its handicapped children of the same age who have that disability.

§ 121a.304 Full educational opportunity goal.

(a) Each State educational agency shall insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children in the area served by the public agency.

(b) Subject to the priority requirements under §§ 121a.320–121a.324, a State or local educational agency may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

§ 121a.305 Program options.

Each public agency shall take steps to insure that its handicapped children have available to them the variety of educational programs and services available to non-handicapped children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

Comment. The above list of program options is not exhaustive, and could include any program or activity in which nonhandicapped students participate. Moreover, vocational education programs must be specially designed if necessary to enable a handicapped student to benefit fully from those programs; and the set-aside funds under the Vocational Education Act of 1963, as amended by Pub. L. 94–482, may be used for this purpose. Part B funds may also be used, subject to the priority requirements under §§ 121a.320–121a.324.

§ 121a.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C).)

§ 121a.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 121a.306 of Subpart C, each public agency shall insure that each handicapped child participates with nonhandicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

(20 U.S.C. 1412(5)(B).)

Comment. Section 121a.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided

Subpart F—State Administration

STATE EDUCATIONAL AGENCY RESPONSIBILITIES; GENERAL

121a.600 Responsibility for all educational programs.
121a.601 Monitoring and evaluation activities.
121a.602 Adoption of complaint procedures.

USE OF FUNDS

121a.620 Federal funds for State administration.
121a.621 Allowable costs.

STATE ADVISORY PANEL

121a.650 Establishment.
121a.651 Membership.
121a.652 Advisory panel—functions.
121a.653 Advisory panel—procedures.

Subpart F—State Administration

STATE EDUCATIONAL AGENCY RESPONSIBILITIES: GENERAL

§ 121a.600 Responsibility for all educational programs.

(a) The State educational agency is responsible for insuring;

(1) That the requirements of this part are carried out; and

(2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:

(i) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and

(ii) Meets education standards of the State educational agency (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(20 U.S.C. 1412(6).)

Comment. The requirement in § 121a.600 (a) is taken essentially verbatim from section 612(6) of the statute and reflects th desire of the Congress for a central point responsibility and accountability in the ed cation of handicapped children within ea State. With respect to State education agency responsibility, the Senate Report P.L. 94-142 includes the following stat ments:

This provision is included specifically assure a single line of responsibility with r gard to the education of handicapped chi dren, and to assure that in the implemen tation of all provisions of this Act and carrying out the right to education for han icapped children, the State education agency shall be the responsible agency * *

Without this requirement, there is abdication of responsibility for the educati of handicapped children. Presently, in ma States, responsibility is divided, dependi upon the age of the handicapped chil sources of funding, and type of services d livered. While the Committee understan that different agencies may, in fact, deli services, the responsibility must remain a central agency overseeing the education handicapped children, so that failure to d liver services or the violation of the righ of handicapped children is squarely t responsibility of one agency. (Senate Repo No. 94-168, p. 24 (1975))

In meeting the requirements of this se tion, there are a number of acceptable o tions which may be adopted, including t following:

(1) Written agreements are developed b tween respective State agencies concerni State educational agency standards and mo itoring. These agreements are binding on t local or regional counterparts of each Sta agency.

(2) The Governor's Office issues an a ministrative directive establishing the Sta educational agency responsibility.

(3) State law, regulation, or policy des nates the State educational agency as r sponsible for establishing standards for educational programs for the handicapp and includes responsibility for monitori

(4) State law mandates that the Sta educational agency is responsible for all ed cational programs.

Aug. 23, 1977

Guidelines

for the

Administration

of

E.M.R.

Programs

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Guidelines for the Administration of E.M.R. Programs

by

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1970

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Chapter II

INITIATING PROGRAMS

PHILOSOPHY

Every child is entitled to an educational program in which he can experience success. In the case of EMR children, who by the nature of their handicap cannot experience a significant measure of success through traditional instruction, the EMR class can provide that educational opportunity. The establishment of these classes represents a refinement of our educational process. These classes should be a part of the total program of any school system.

LEGALITY

- By statute all educable children of legal school age are required to attend school. (Section 3321, Ohio Revised Code)
- Section 3323 of the Ohio Revised Code grants permission to local boards of education to establish and maintain special classes for educable mentally retarded children five and over.

ESTIMATE OF INCIDENCE

- Reported incidence figures vary in Ohio school districts according to community size, population, density, economic evaluation, and extent of mobility.
- A majority of communities in Ohio experience a 40:1,000 incidence of EMR pupils of public school age.

Screening

- Early identification of the child who experiences consistent learning difficulties is essential.
- Classroom teachers, with the help of the principal, shall refer children for psychological assessment.

Younger Children (C. A. 5, 6, 7)

1. They exhibit difficulty in adjusting to school routine.
2. They are unable, even after **repeated exposure**, to complete simple activities of a visual, auditory, or motor nature which other children of kindergarten level can do without hesitation.

3. They are limited in communication skills.
4. Some have difficulty in self-help skills, such as toileting.
5. They are unable to score successfully on the usual kindergarten-first grade readiness tests.

Older Children (C. A. 8 and over)

1. They have scored 80 or lower on previous group intelligence tests.
2. They are over-age for the grade in which they are placed.
3. They are doing failing work in their present grade situation, irrespective of previous test scores.

All Age Levels

1. They are children about whom the teacher has serious questions. (Teachers should be encouraged to refer children who present instructional instead of behavioral problems.)
2. Official medical and psychological diagnosis may often suggest that a complete evaluation of the pupil is necessary in order for him to receive an adequate education.

Psychological Services

- Section B, (2) and (3), State Board of Education Standards 215-07 (Appendix A), requires that in all districts employing a school psychologist, and in other districts where psychological services are available, the determination of intelligence quotient shall be made on the basis of individual examinations by a qualified psychologist.
- It is the psychologist's duty to:
  1. Establish the student's intelligence quotient
  2. Evaluate the student's ability to benefit from school placement on the basis of the child's personal characteristics
- A copy of the psychologist's report shall be made available to the special class teacher.

Unavailability of Psychological Services

- Where local psychological services are not yet available, provisional admission to the class may be made on the basis of two or more group intelligence tests.
- Both tests should be different.
- Both tests must have been administered within the last six months.
- BOTH SCORES OBTAINED MUST BE BELOW 80 I. Q.

EDb-215-07 PROGRAM STANDARDS FOR SPECIAL EDUCATION UNITS FOR EDUCABLE MENTALLY RETARDED CHILDREN (SLOW LEARNING)

(Adopted August, 1966)

A. General

1. A special education unit or fractional unit may be approved for educable mentally retarded children only within these standards.
2. A special education unit or fractional unit may be approved for an experimental or research unit designed to provide a new or different approach to educational techniques and/or methodology related to educable mentally retarded children.
3. A special education unit for supervision of a program for educable mentally retarded children may be approved when there are 30 or more approved units in a district.
   a. Two or more districts may share an approved unit for supervision.
4. All children enrolled in an approved special education unit for educable mentally retarded children shall meet the standards listed herein.
5. A work-study coordinator who works full time with administrators, school staff, parents, pupils and the business community on problems relating to the job training and adjustment of senior high school educable mentally retarded pupils may be considered for approval as a full unit.
   a. Approval of such units shall be based upon a plan submitted in advance to the Division of Special Education.
   b. Two or more districts or high schools may share an approved unit for work-study coordination.
6. The superintendent of the school district of attendance (or his designated representative) is responsible for the assignment of pupils to approved special education units.

B. Eligibility

1. Children shall be in the general intelligence range of 50 through 80. They shall also be of legal school age in the district operating the class, and must have sufficient maturity to adjust to general school routines.
2. Intelligence level shall be determined through an individual examination by a qualified psychologist.
   a. Preference is given to the Binet scale for children of

elementary school age. The psychologist should use supplementary measures whenever need for these is indicated.

3. A copy of the psychological report shall be available to the classroom teacher.
4. In areas or school districts where school psychological service is not available, provisional admission to the class may be made on the basis of two or more recent group tests showing close agreement. Children so placed shall not score higher than 80 on either group test and should be given an individual appraisal within two years of placement in the special class.
5. Children placed in classes for the educable mentally retarded shall be reevaluated periodically. Initial test results which are more than three years old shall not be used for continued placement.
   a. Pupils who exhibit noticeable difficulty in behavioral adjustment and/or instructional progress in the special class(es) shall be given more frequent and more detailed reevaluation, including an appropriate medical diagnosis where indicated.
6. Educable mentally retarded crippled children, or educable mentally retarded children with serious visual or hearing handicaps who reside in school districts where classes for children with similar physical handicaps are not available but where regular educable mentally retarded classes do exist, may be enrolled in such slow learning classes if:
   a. They have been adjudged educable mentally retarded on the basis of an individual psychological examination.
   b. They are referred as crippled, visually handicapped, or hearing impaired by the proper medical authority.
   c. They can be transported either on the school bus or by other means as may be provided for physically handicapped children.
   d. They are sufficiently ambulatory, in the case of crippled children, to care for their own physical needs in a regular school situation.
   e. They fit the age range of the class or classes in operation and if the enrollment in such class(es) is sufficiently low that a physically handicapped child can be accomodated.

C. Class Size and Age Range

1. Minimum class size of a unit for the educable mentally retarded shall be 12 children.

2. Maximum class size is as follows:
   a. An elementary unit with an age range of 24 months or less shall not exceed an enrollment of 20 pupils.
   b. An elementary unit with an age range of 25 to 48 months shall not exceed an enrollment of 16 pupils.
   c. A secondary unit with an age range of 24 months or less shall not exceed an enrollment of 22 pupils.
   d. A secondary unit with an age range of 25 to 48 months shall not exceed an enrollment of 20 pupils.
   e. In a secondary unit where a work-study program is in operation, maximum class size shall not exceed 30 pupils.
3. Class size may be adjusted downward for individual units at any age level where pupils with multi-handicaps are enrolled.

D. Housing, Equipment and Materials

1. A special education unit for educable mentally retarded children shall be housed in a classroom in a regular school building, which meets the Standards adopted by the State Board of Education, with children of comparable chronological age.
2. Equipment and materials shall be appropriate for the maturity and interest levels of the children.

E. Program

1. A comprehensive program shall be provided to serve all educable mentally retarded children on a continuum from primary through high school.
   a. A district initiating its first unit shall provide a continuous program primary through secondary levels within six years.
   b. A district with a high school program shall develop a work-study program within three years from the time the special program is initiated.
   c. Two or more school districts may combine resources in order to provide adequate facilities for all educable mentally retarded pupils in the cooperating districts.
2. Program organization shall be essentially the same as the program for other pupils of the same age in the same building. This applies to the length of the school day, amount of participation in general school activities, and grouping of pupils in the same classroom.
   a. In the elementary school the unit is primarily self-contained.

b. In the secondary school, educable mentally retarded children shall participate with the general student body in selected non-academic courses and activities.
c. In secondary schools where several teachers work in a departmentalized manner, each teacher shall have the equivalent of one special unit as a full time assignment.
d. In secondary schools where one special teacher carries full responsibility, this teacher shall have one special class only. While not all pupils at this age level remain with the special class teacher all day, the teacher's responsibility is a full time one.

3. The instructional program for all age levels shall be appropriate to the needs and capabilities of educable mentally retarded pupils.
   a. In the elementary programs, the special teacher has full time responsibility for the children.
   b. In the secondary program, all academic work, personal and occupational guidance shall be carried on by the special class teacher(s). In addition, the special class teacher has the responsibility for coordination of the total instructional program for these pupils within the school.
   c. The curriculum of an approved unit in high school shall include the minimum requirements toward graduation as established by the Ohio High School Standards.
   d. Work-study programs in the senior high schools shall be a part of the total curriculum offering for these students.
4. Teachers shall follow outlines and/or special courses of study in their daily program planning as designed for educable mentally retarded children.
5. There shall be evidence of periodic evaluation of the educational progress of all children above the primary age range placed in approved units for educable mentally retarded children.

F. Teacher Qualifications

1. A teacher shall meet all the requirements for certification as established by the State Board of Education for this area of specialization.

OHIO
SCHOOL ATTENDANCE
HANDBOOK

School Attendance Laws
Age and Schooling Certificates
The Employment of Minors

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1971

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tion of the child while he is an inmate of the semi-public children's home.

A child is a "ward" for the purposes of Section 3313.64, Revised Code, only if the facts warrant the conclusion that an "actual resident" of a school district stands in *loco parentis* to the child. 1963 OAG 545.

9. When a county child welfare board assumes control of a school age child and such child is placed by the board in the county children's home or in a foster home, the child's district of school residence prior to the board's assumption of control must pay tuition to another school district in which the child subsequently attends school. 1966 OAG 077.

Section 3321.07. Requirements for Child Not Attending Public Schools.

If any child attends upon instruction elsewhere than in a public school, such instruction shall be in a school which conforms to the minimum standards prescribed by the state board of education. The hours and term of attendance exacted shall be equivalent to the hours and term of attendance required of children in the public schools of the district. This section does not require a child to attend a high school instead of a vocational, commercial, or other type of school, provided the instruction therein is for a term and for hours equivalent to those of the high school, and provided his attendance at such school will not interfere with a continuous program of education for the child to the age of sixteen.

Comments:

1. A child of compulsory school age, who has completed first eight grades of the school curriculum, is not required by the Ohio statutes to attend high school or pursue the curriculum there afforded providing he regularly attends a vocational, commercial or other special type of school, parochial or otherwise, which provides instruction for a term and hours equivalent to those of established high schools. 1944 OAG 7149.
2. Pupil attendance at an elementary school which is not tax supported and which fails to meet the minimum standards for such school set by the state board of education is not in such school attendance as defined by the compulsory education laws. 1960 Inf OAG 233.
3. Requirements for issuance of age and schooling certificates are outlined in Chapters V, VIII-XVIII of this handbook.

Section 3321.08. Part Time Day School; Definition.

Every child who has been granted an age and schooling certificate excepting such children who have been determined to be

mind who are suffering from epilepsy, who on account of said affliction cannot be assembled in school, when in his judgment the same will be beneficial to them. 1929 OAG 381.

Section 3321.05. Determination of Capacity of Child; Record, Supervision of Incapable Children.

A child of compulsory school age may be determined to be incapable of profiting substantially by further instruction.

The state board of education may prescribe standards and examinations or tests by which such capacity may be determined, and prescribe and approve the agencies or individuals by which they shall be applied and conducted; but the capacity of a child to benefit substantially by further instruction shall be determined with reference to that available to the particular child in the public schools of the district in which he resides, and no child shall be determined to be incapable of profiting substantially by further instruction if the superintendent of public instruction, pursuant to board standards, finds that it is feasible to provide for him in such district, or elsewhere in the public school system, special classes, or schools, departments of special instruction or individual instruction through or by which he might profit substantially according to his mental capacity as so determined. In prescribing, formulating, applying, and giving such standards, examinations or tests, the state board of education may call for assistance and advice upon any other department or bureau of the state, or upon any appropriate department of any university supported wholly or partly from state appropriations.

The result of each examination or test made with the recommendation of the agency or individual conducting the same, shall be reported to the superintendent of public instruction, who, subject to board standards, may make the determination authorized in this section. If a child is determined to be incapable of profiting substantially by further instructions, such determination shall be certified by the superintendent of public instruction to the superintendent of schools of the district in which he resides, who shall place such child under the supervision of a visiting teacher or of an attendance officer, to be exercised as long as such child is of compulsory school age. The superintendent of public instruction shall keep a record of the names of all children so determined to be incapable of profiting substantially by further instruction, and a like record of all such children residing in any school district shall be kept by the superintendent of schools of such district. Upon

request of the parents, guardians, or persons having the care of such child whose residence has been changed to another school district, the superintendent of schools shall forward a card showing the status of such child as so determined by the superintendent of schools of the district to which the child has been moved.

Any determination made under this section may be revoked by the state board of education for good cause shown.

A child determined to be incapable of profiting substantially by further instruction shall not hereafter be admitted to the public schools of the state while such determination remains in force.

Comments:

1. **The final determination of child's low mentality by the state department of education is essential to the child's exclusion from public school. The local board's exclusion of a child merely on the basis of tests prescribed by the state department of education is unauthorized. Bd of Ed v State 47 App 417, 191 NE 914.**
2. **Unless and until a determination that a child with an intelligence quotient below 50 is incapable of profiting substantially by further instruction, the age limits to be considered in determining the necessity for providing classes to such children are the same age limits which must be considered for providing classes for all children. Until such a determination is made, therefore, the only age limits which have any application to providing classes for children are the compulsory school age limits contained in Section 3321.01, Revised Code, which provides that a child between six and eighteen years of age is of compulsory school age. O.A.G. 69-040.**
3. **See Chapter VII for State Board of Education Standards.**

OAG 69-040. Authority to Provide Programs for Trainable Retarded Children.

It is mandatory for a local board of education to provide training and/or educational facilities and services for children with an IQ of 50 or below unless such children have been determined to be incapable of profiting substantially by further instruction as provided by Section 3321.05 R.C. (See State Board Standards) Otherwise, there is no IQ below which a local board of education is without authority to provide classes for children.

In accordance with Section 3317.08 R.C., a local board of education is entitled to receive tuition from other local boards of education in those instances specifically provided by statute.

Attendance at Part-Time Day School if Granted Age and Schooling Certificate

According to Section 3321.08, students who are of an age re-

Chapter VII

OHIO STATE BOARD OF EDUCATION
PROGRAM STANDARDS FOR LEGAL DISMISSAL
FROM SCHOOL ATTENDANCE
DUE TO INABILITY TO PROFIT FROM
FURTHER INSTRUCTION
EDb-215-13)

(A) General

(1) All dismissals shall be approved by the State Superintendent of Public Instruction within the standards adopted by the State Board of Education.

(2) A child approved for dismissal in accordance with these standards cannot legally be admitted to the public schools of this state while the dismissal is in force.

(3) A dismissal may be revoked by the State Superintendent upon receipt of a written request from the school district in which the child resides.

(4) A dismissal may be revoked by the State Board of Education when good cause is shown.

(B) Eligibility

(1) *Compulsory School Age*

Approval of dismissals will be granted *only* on children that are compulsory school age. (Chronological age between 6 and 18 years of age.)

(2) *Children Under Calendar Age 10 Years, Intelligence Quotients Below 50*

Dismissals of children within this range may be approved on a temporary basis for one or two years, depending on the date submitted.

(3) *Children Over Calendar Age 10 Years, Intelligence Quotients Below 50*

Dismissals of children within this range may be approved on a permanent basis.

(4) *Children with Calendar Ages 14 and 15, Intelligence Quotients Below 60*

Dismissals of children within this range may be approved on a permanent basis.

(5) *Children Over Calendar Age 15, Intelligence Quotients Below 70*

Dismissals of children within this range may be approved on a permanent basis.

(C) Procedures

(1) All applications shall be submitted in triplicate and shall be signed by the superintendent of the district in which the child resides (or by his designated representative).

(2) All applications shall carry the results of the psychological test and the name and position of the individual administering the test.

(3) All children shall be evaluated by an qualified psychologist using individual intelligence scales.

(4) All children must have been evaluated within the 12-month period prior to the date of application.

(5) In complying with Sections B-4 and B-5, sufficient evidence shall be submitted in a written report to substantiate that the child is not capable of profiting substantially from an appropriate educational program. This report shall include all pertinent information relating to the child.

(6) In some cases there are factors other than intelligence and age that should be considered. Complete information concerning such factors shall be submitted with the application.

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[1] Adopted by the Ohio State Board of Education in April, 1960, and revised July, 1962, and August, 1966.

Application for dismissal from school attendance under provisions of Section 3321.05 Revised Code may be submitted at any time using the form on the following page.

Board of Education Exhibit ZZ

STANDARDS FOR SPECIAL EDUCATION

Ohio Department of Education
Columbus, Ohio

J-65

STANDARDS FOR SPECIAL EDUCATION

Effective June 30, 1973

Standards for Due Process and Procedural Safeguards for Handicapped Children and Youth

Effective August 28, 1976

Standards for Identification of Handicapped Children and Youth

Standards for Multi-Factored Evaluation, Least Restrictive Placement and Individualized Educational Plan

Standards for Related Services

Effective April 25, 1977

Standard for Transportation to Residential Schools

Standard for Admission, Transfer, Suspension and Expulsion — the Ohio State School for The Blind and the Ohio School for the Deaf

Effective July 4, 1977

Franklin B. Walter
Superintendent of Public Instruction

R. A. Horn
Executive Director
Compensatory and Habilitative Education

S. J. Bonham, Jr.,
Director, Division of Special Education

Ohio Department of Education
Columbus, Ohio

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Robert E. Williams, Xenia

J-66

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educational aide permit as defined in Section 3319.088 of the Revised Code.

b. The school district shall have written policies and procedures outlining:

(1) Criteria for selection.

(2) A planned sequence of continuing education.

(3) The process for direct continuing supervision and evaluation of the services of such personnel.

(4) Job description of the role and function and administrative relationship.

3301-51-04 PROGRAM STANDARDS FOR CHILDREN WITH SEVERE AND/OR MULTIPLE IMPAIRMENTS

A. General

1. A special education unit may be approved for children with severe and/or multiple impairments only with these standards (e.g. deaf/blind, autistic, aphasic, et. al.)

2. A special education unit may be approved initially as an experimental unit to determine the developmental level of achievement in selected areas and make the appropriate recommendation for instruction and placement for children with severe and/or multiple impairments.

A school district requesting approval for such a unit shall submit a written proposal to the Division of Special Education and receive written authorization in advance of implementation.

The application shall include:

Rationale for the proposal
Definition of target population
Assessment and placement procedures
Projected staffing ratio
Description of needed facilities
Qualifications of the teacher
List of materials and equipment
List of measurable objectives at the administrative, program, teacher and child levels
Plan for supervision.

An annual evaluation of the objectives shall be submitted by July 1 in accordance with a format provided by the Division of Special Education.

B. Eligibility

1. Any child who meets the following requirements shall be eligible for and may be placed in a special education unit for children with severe and/or multiple impairments.
   a. Is of legal school age.
   b. Is capable of profiting substantially from instruction as determined through a multi-factored assessment procedure administered by a qualified psychologist.
   c. Is a child with such severe communication, behavioral, developmental and educational problems that he cannot properly be accommodated in any existing special education program.
2. All children being considered shall be examined by a licensed physician for initial placement. Medical consultation should be encouraged on a continuing basis — especially when the school feels that there has been a change in a child's behavioral or educational functioning or when new symptoms are detected.

C. Assessment and Placement

1. The superintendent of the school district of attendance is responsible for the assignment of pupils to approved units.
2. The school district shall have written criteria to determine eligibility for and placement of students in approved programs and services. Such criteria shall include:
   a. Standards adopted by the State Board of Education.
   b. Assessment of achievement, adjustment and social adaptability.
   c. Provisions for including additional criteria, when relevant, to the unique characteristics of the school population.
   d. Priorities to establish placement of students on the basis of the individual student's need.
   e. Process for providing an opportunity for a conference with parent(s) or guardian(s) prior to placement of any student in approved programs or services.
   f. Provisions for a systematic procedure to re-evaluate students in approved programs to assess their progress, current status and future educational needs.

D. Additional program options may be approved on the basis of guidelines adopted by the State Board of Education.

G. Educational Programs

1. The instructional program should provide each student with academic, social and occupational skills leading to independence as an adult.
2. Teachers shall incorporate assessment information, instructional objectives and evaluation data in the instructional program.
3. Program organization for an instructional unit shall be essentially the same as for other children of comparable age in the school district.
4. Children with severe behavioral handicaps in an approved unit shall be provided with a program that reflects both educational and treatment components.
5. The treatment program provided shall meet the standards of the Ohio Department of Mental Health and Retardation or the equivalent approved by the Division of Special Education.
6. A complete written report, including both educational and treatment program for each child enrolled in an approved unit, shall be on file at the treatment facility and shall be available to the Division of Special Education.
7. The report shall include a social-behavioral assessment, psychiatric and psychological evaluation, academic evaluation, an outline of the education and treatment program, an estimate of prognosis, and a plan to return the child to the regular school program.
8. There shall be evidence that the teacher maintains periodic records for each child's individual academic and social behavioral instructional program.
9. There shall be evidence of periodic reporting to the parents regarding the child's academic progress and behavioral adjustment.
10. Appropriate techniques shall be utilized in the classroom to reduce stimuli, to minimize trial and error learning, to develop better self-concepts and to provide direction leading to increased self-control.
11. Teachers of approved classroom units for children with severe behavioral handicaps shall have as a full-time assignment the instruction of those eligible children for whom they are responsible.

H. Supervision and Other Support Staff

1. A supervisory unit may be approved for a program for children

discuss the child's individualized educational plan, and to re-evaluate appropriateness of the placement.

2. *Placement Team Conference:* A conference of the multidisciplinary staff placement team shall be held to make recommendations regarding any change in the educational placement of the child. A placement team conference shall contain the following provisions:

   a. Participants. In addition to the placement team members, and at the discretion of the Chairperson, participants in the conference may include an appropriate representative of the child's home school, school personnel involved in the evaluation of the child, those persons who may become responsible for providing a special education program or service to the child, the parents, and any others who have a current, demonstrated educational interest in the proceedings.

   b. The purposes of the conference shall be to:

      (1) establish a composite understanding of the child's learning characteristics, sensory and motor skills and behaviors;

      (2) determine eligibility for special education programs or related services;

      (3) determine the child's unique educational needs and the extent to which these needs can be met by the standard program;

      (4) determine the nature and degree of special education intervention needed and recommend appropriate placement including an estimate of the length of time such placement is expected to be appropriate;

      (5) make recommendations regarding the development of an individualized educational plan indicating specific objectives to be attained by the child;

      (6) establish data requirements for the re-evaluation procedure which shall take place within a year's time.

   c. A written report of the results and recommendations of the placement conference shall be prepared.

      (1) The conference report shall be dated, list names of all those in attendance, and be signed by the chairperson.

      (2) A copy of the conference report shall be kept on file by the school district providing the educational program.

(3) A copy of the conference report and all other pertinent information shall be sent to the superintendent prior to his decision regarding the child's placement.

(4) Confidentiality standards shall be followed in regard to this data.

d. The multi-factored evaluation and team placement conference shall be completed within 90 days of the date of referral or the date of application for admittance to the public school by the parents of the child.

e. The superintendent shall make a placement decision within 15 days of receipt of the placement team conference report and shall notify the parents of the decision by certified mail, return receipt requested in accordance with Standards relating to prior notice.

3. *Administrative Review:* The child, his parents, or educational agency other than the school district may request an opportunity to present complaints to the superintendent regarding the evaluation or educational placement of the child or the provision of special education.

a. Upon receipt of a complaint, the superintendent, without undue delay and at a time and place convenient to all parties, shall conduct a review, and may hold a hearing, and shall notify all parties in writing of his decision within 20 days.

b. Every effort should be made in the review to resolve any disagreements and to avoid a formal hearing.

c. All parties have the right to invite others to participate in the informal hearing, including legal counsel.

d. Any party aggrieved by the decision of the superintendent may present a formal complaint in writing within 20 days to the board of education and the superintendent requesting an impartial due process hearing.

4. *Impartial Due Process Hearing:* An impartial due process hearing may be requested when there are differences on any matter relating to the evaluation or educational placement of the child, or when the provision of a free and appropriate public education to such child cannot be resolved through the conference and review procedures outlined above.

a. An impartial due process hearing may be requested by the school district, the parents, or other persons having primary care, custody or educational responsibility for the child.

tion, maintenance, updating and reporting and which assists in making appropriate educational program decisions for handicapped children who may need special education programs and/or related services.

d. "In-school" means the child is enrolled and attends school within the school district or has been placed in another school district, or an agency administered by the Ohio Department of Mental Health and Mental Retardation or Ohio Youth Commission for the purposes of receiving a special education program and/or related service.

e. "Out-of-school" means the child is neither enrolled nor attends school within the school district or any other educational agency.

f. "Referral" means specific activity, formal or informal, by which the name or other personally identifiable data regarding a child with a handicapping condition or suspected handicapping condition is provided to a school district.

g. "Appropriate public education" means special education and related services that:

(i) Are provided at public expense and under public supervision;

(ii) Meet the standards of the State Board of Education;

(iii) Include an elementary and secondary education, and may include a preschool education;

(iv) Are provided in accordance with the least restrictive alternative placement as defined in 3301-51-18, Section (C), Standards for Multi-Factored Evaluation. Least Restrictive Placement and Individualized Educational Plan;

(v) Are provided in conformity with the Individualized Educational Plan required under 3301-51-18, Section (D), Standards for Multi-Factored Evaluation, Least Restrictive Placement and Individualized Educational Plan.

h. "Served" means that an appropriate special education program and/or related service(s) is being provided the handicapped child.

i. "Unserved" means that an appropriate special education program and/or related service(s) is not being provided the child, that the child has been diagnosed as handicapped and that the child needs a special education program and/or related service(s).

4. The parents shall be provided a statement that if no response is received to the request for permission to evaluate within thirty days of receipt of notice the school district may proceed with the evaluation.
5. Parents shall be informed of other items involved in evaluation:
   a. Reasons the evaluation has been requested and the name of the person(s) who initiated the process;
   b. An accurate and concise description of any suspected problem;
   c. The names of persons responsible for providing evaluation information;
   d. A description of the potential advantages and limitations of the proposed evaluation;
   e. A description of possible special education program options;
   f. General description of procedures and instruments that will be used;
   g. Access to a summary of multi-factored evaluation data;
   h. A description of how the findings of the evaluation are to be used, by whom, and under what circumstances;
   i. A statement of the right of the parent(s) to obtain an independent educational evaluation at their own expense;
   j. A declaration that the child's educational status will not be changed without the parent's knowledge or upon the decision rendered in an impartial due process hearing.

C. Multi-Factored Evaluation

1. The school district shall be responsible for the multi-factored evaluation.
2. Personnel conducting the multi-factored evaluation shall be qualified in accordance with State Board of Education Program Standard 3301-51-19.
3. Multi-factored evaluation may be conducted by one or more personnel from the school district and shall include other personnel when appropriate.
4. Descriptive evaluation data shall be compiled from as many of the following areas, and other areas, as deemed necessary for determining the child's educational performance including the learning characteristics and the child's unique educational needs:

a. Medical history and evaluation,
b. Educational and developmental history,
c. Personal/social/emotional functioning,
d. Cognitive functioning,
e. Academic functioning,
f. Vocational/occupational needs,
g. Communication skills,
h. Gross/fine/sensory motor skills,
i. Adaptive behavior.

5. Information provided by the parents shall be considered in the multi-factored evaluation.

D. Placement

1. The school district shall place each handicapped child residing within the district in an appropriate educational program in accordance with Standards adopted by the State Board of Education.

2. When a placement is to be made in another school district, another educational agency, or in an agency administered by the Department of Mental Health and Mental Retardation, the superintendent shall consult with the agency directly affected by the placement.

3. The placement team chairperson(s) and placement team members shall be designated by the superintendent of the school district of residence.

4. Upon request, the parents shall be given the opportunity for a case conference regarding their child's placement.

5. In addition to the placement team members, and at the discretion of the chairperson, other participants in the conference may include additional representatives of the child's home school, school personnel involved in the evaluation of the child, those persons who may become responsible for providing a special education program or service to the child, the parents, and others who have a current, demonstrated educational interest in the proceedings.

6. Placement team conference shall be held to:
   a. Determine if the data is adequate;
   b. Identify specific areas where additional evaluation is needed;
   c. Recommend further evaluation where necessary;

d. Determine eligibility for special education programs or related services;

e. Determine the child's unique educational needs;

f. Determine the nature and degree of special education intervention needed including an estimate of the length of time such placement is expected to be appropriate;

g. Recommended placement in the least restrictive alternative.

7. A written report of the results and recommendations of the placement conference shall be prepared.

a. The conference report shall be dated. list names of all those in attendance, and be signed by the chairperson.

b. A copy of the conference report shall be kept on file by the school providing the educational program.

c. A copy of the conference report and all other pertinent information shall be sent to the superintendent prior to the decision regarding the child's placement.

d. Confidentiality standards shall be followed in regard to this data.

e. The superintendent of the school district of residence shall be responsible for placement of the child in accordance with Section 3319.01 of the Revised Code, Due Process Standards 3301-51-16 and in accordance with the school district's approved comprehensive plan.

f. The superintendent of the school district of residence shall notify the parents by certified mail of the placement decision within fifteen days after the receipt of the placement team conference reports, and shall set the date for completion of the individualized educational plan within thirty attendance days after placement.

g. The parent may agree to placement and waive the right to certified letter.

h. Upon notification by certified mail, the school district may proceed with placement.

E. Least Restrictive Alternative

1. Each school district shall establish and maintain written procedures to assure that to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped.

Board of Education Exhibit G

CONFIDENTIAL CONFIDENTIAL

KENT CITY SCHOOLS
PSYCHOLOGICAL SUMMARY

Name: Tommy Rettig Date of Testing: Sept. 2, 1971

Tommy Rettig was brought to the De-Peyster Building by his mother for the determination of an appropriate educational program. Tommy was 6 years and 3 months old at the time of the examination. His mother reported that he had previously taken part in a program at Happy Day School.

The writer attempted to administer the Stanford-Binet Ability Test and a drawing test to Tommy. A basal could not be established on the Binet. It is estimated that Tommy's I.Q. is at or below 48 and Mental Age at or below 3-0.

Tommy was unable to accomplish any pencil paper tasks beyond random scribbled attempts at circles. He exhibited extreme hyperactivity and failed to exhibit any goal directed behavior. He has a significant language delay.

Mrs. Rettig was informed that in view of hyperactivity, delay in language and low measured ability, the recommendation was for Tommy to continue his education at Happy Day School. An E-1 will be filed with the State Department.

(signed)
Geraldine Irvin, School Psychologist

GI/bm

Form E-1

STATE OF OHIO
Department of Education
APPLICATION FOR DISMISSAL FROM SCHOOL ATTENDANCE UNDER PROVISIONS OF SEC. 3321.05 R.C.
(Form E-1--Submit in Triplicate)

File No. _____

Name of child Thomas Rettig _____ Birthdate 5/30/65

Boy [X] Girl [ ] Present age 6-3

Grade Placement ------ Number of years in school ----

Psychological Data:

Name of Test Used Stanford Binet (L-M) Date of Examination 9/2/71

Test Results: C.A. 6-3 M.A. Estimated 3-0 I.Q. Est.48--could not establish basal

Name of Psychologist Geraldine Irvin Position School Psych.

Is child physically handicapped? Yes [ ] No [X]

Specify physical handicap _____

(In all questionable cases applications should be accompanied by supplemental data.)

K-79

(Board of Education Exhibit H)

Will this child become employed (if above 14) Yes ___ No ___

Specify type of employment _____

I hereby recommend that this child be dismissed from school attendance-

Superintendent of Public Instruction:	Name of School District in County
	KENT CITY SCHOOLS
Temporary until _____	County, City, or Exempted Village
Permanent _____	_____
	Superintendent of Schools
Date approved _____	

K-8a

Board of
Education
Exhibit BB

May 25, 1972

Mrs. R. Rush, Coordinator
Comprehensive Care Office
Metropolitan General Hospital
3395 Scranton Road
Cleveland, Ohio 44109

Re: Thomas Rettig - Kent, Ohio

Birthdate: 5-30-65

Dear Mrs. Rush:

The parents of the above named child are requesting that their son, Tom, be considered for placement into one of our special education classes for the 1972-73 school year. They have also asked that we send you a letter describing our concerns and specific medical information needed to better help Tom.

In consideration of Tom's observed behavior and our inability on two different dates to obtain a valid measurement of his school ability, we have requested that Tom be provided with a comprehensive medical examination. We are particularly concerned about Tom's extreme hyperactivity, language

confusion, and inability to maintain his attention to any task for more than a few minutes.

Tom's educational prognosis is very unfavorable. We feel strongly that any child with behavior like Tom's or those labeled as emotionally disturbed should have a complete medical exam including tests for hypoglycemia, thyroid check, central nervous system evaluation and any other possible medical tests that may determine the cause of extreme hyperactivity.

Your assistance in providing us with such information would be very much appreciated.

Sincerely yours,

Michael Chrin, Director
Child Study & Special Education

MC/bm

Board of Education Exhibit HHH-53

Form 298
CLEVELAND METROPOLITAN GENERAL HOSPITAL
3395 Scranton Rd., Cleveland, OH 44109

MEDICAL INFORMATION PERMIT

CLEVELAND METROPOLITAN GENERAL HOSPITAL is hereby granted permission to disclose and deliver to

Michael Chrin, Psychologist
Kent City Schools
(Full name of person, firm or institution, etc., to be designated)
any and all information contained in the medical records of

Tommy Rettig
Name of Patient

Unit Number

Such information disclosed or delivered may include the complete case history as shown by the records and any other information in the possession of Cleveland Metropolitan General Hospital.

Signed Matthias Rettig
Address 586 Francis St.
Relationship (if not patient) father
Date 7-19-72

Board of Education Exhibit HHH-10

CLEVELAND METROPOLITAN GENERAL HOSPITAL
PSYCHOLOGICAL CONSULTATION

NAME: Rettig, Thomas
DOB: 5-30-65
DOE: 7-12-72, 7-13-72, 7
C.A.: 7 years, 1 month
U#: 35-70-71
Referred by: Pediatric Neurology

Tommy was referred for a psychological evaluation in order to assess his level of intellectual functioning and potential and to aid in an appropriate school placement for him.

Tommy's early developmental milestones were considered "slow" by his parents. He has been labeled as "hyperactive" and previously was excluded from nursery school after 3 days. Tommy has a 5 year old sister which the parents consider to be very bright. One wonders whether this is in relation to Tommy, their own defense system, or a reality.

On the ward, Tommy was not hyperactive,

but was distractible and anxious. On a one to one basis he was able to attend to tasks and to cooperate in a testing situation. However, Tommy has his own "system" of operation. This system works well with his parents (by observation) and with many of the personnel on the ward; i.e. when asked to select an object, picture etc., Tommy picks every object but the named one. If one follows his eyes--his first response is to the request. When placed in an anxiety situation Tommy quickly responds by 1) crying, 2) demanding to go to the bathroom, 3) asking for his mother, 4) bringing up irrelevant material.

The results of the psychological evaluation and speech evaluation indicate that Tommy is currently functioning within the lower level of the educable retarded range of intelligence.

An inter-disciplinary conference was held with the parents on 7-19-72. It was

obvious that Mr. and Mrs. Rettig are very ashamed of having a child like Tommy. They are confused about training and disciplinary methods and are heartbroken with the reality that their son will never be able to assume a place in society which will measure up to their aspirations.

It is our feeling that Tommy would function best in an EMR setting. It is essential that the parents receive continual counseling. In discussing an appropriate school placement with Mrs. Atwood of the University of Akron Nursery School, it was her feeling that Our Lady of the Elms a school in Akron could provide an academic environment for Tommy and that Sister Shirley Ann, principal could very competently work with the parents. Since Sister Shirley Ann would not be available until after August 1st, this was not discussed with her.

The above information was discussed with the parents. After August 1st I will

contact Sister Shirley Ann and discuss Tommy with her.

(Signed)
Dorris Tinker
Senior Psychologist
Pediatric Psychology

DT/mch

Board of Education
Exhibit HHH-34

CLEVELAND METROPOLITAN GENERAL HOSPITAL
Cleveland, Ohio 44109

DATE: 1-8-74 Psychology

Formal evaluation (as much as could be accomplished) completed. If the statistical scores are compared to those of his last admission, Tom has "lost ground." However, I feel that this is not really true. He has gained very little--but he does not attend to requests to do specific things--it is his decision not to comply.

Imp. Retarded child & secondary emotional problem.

Rec.: Placement at Rosemary for behavior modification.

(Signed) Dorris Tinker
Psychologist

Board of Education Exhibit GG

586 Francis Street
Kent, Ohio 44240

November 29, 1976

To: Mike Chrin, Director of Special Education, Kent City Schools

From: Eva Rettig, parent

Re: Consent for multi-factored evaluations of Thomas Rettig

In order to insure a maximum educational experience designed to meet the unique needs of my son Thomas Rettig, born May 30, 1965, now residing with his family at 586 Francis Street, Kent, Ohio, I give permission to Mr. Mike Chrin, Director of Special Education of theKent Public Schools, to conduct a multi-factored evaluation of Thomas.

The areas of evaluation and the names of the professionals rendering the prescriptive services are the following:

1. Psychological, Robert Robinson, Ph.D., MEO/SERRC

2. Language development, Dr. Karen DeOreo, Ph.D., K.S.U. and her professional consultant(s)
   Linda Watt, Speech Therapist, Kent Schools

3. Adaptive behavior, current school placement, Linda Leavitt, K.S.U.S.

4. Physical development and Recreation Karen DeOreo, Ph.D., K.S.U., and professional consultant(s).

5. Occupational therapy, professional's name unkown at this time

I request a copy of each of the written recommendations prior to the conference, to enable Tom's parents to seek pertinent answers relating to specific problems:

1. A statement of the present levels of performance.

2. A statement of annual goals, including short-term instructional objectives.

3. A statement of the specific educational services to be provided (tutoring, appropriate group experiences; counseling).

4. The projected date for initiation and anticipated duration of such services.

5. Appropriate objective criteria and evaluation procedures and schedules for determining whether instructional objectives are being achieved, and whether current placement is appropriate.

(signed)
(Mrs.) Eva Rettig
Mother

Board of Education Exhibit S

PSYCHOLOGICAL REPORT

Name: Tommy Rettig Add.: 586 Francis St. Kent, Ohio

Birthd.: 5-30-65 Tel.: 678-0988

Parents' N.: Eva/Matt School: University

Date Tested: 12-3-76 Grade: Autistic class

Reason For Referral:

Tommy was referred for an evaluation of his present level of intellectual development. A formal assessment of this type has not been completed prior to this time and was requested by Mr. and Mrs. Rettig.

Background Information:

Tommy has been in the Kent City autistic program for the past three years. During this time, academic progress has proved quite slow. Similarly, expressive language skills are still lagging considerably below the average for Tommy's chronological age. His social behavior is characterized by a seeming disinterest in others as well as in his immediate environment. Generally, Tommy is not a dis-

ruptive boy in the classroom, but rather isolates himself from others. However, he is capable of responding appropriately to the directives of his teacher and is able to receive and display a certain amount of affection. Mr. and Mrs. Rettig have, and still continue, to spend a great deal of time with Tommy at home in an effort to develop his academic and language skills. Various teaching approaches and methods have been utilized by the Rettigs in attempting to raise the functional level of these abilities.

Tests Administered

Stanford-Binet Intellegence Scale
McCarthy Scales of Children's Abilities
Peabody Picture Vocabulary Test
Leiter International Performance Scale
Perceptual Copy Forms

Test Observations and Results

The testing that was attempted was completed over a period of one week. A

series of pre-test observations were made prior to involving Tommy in the actual testing situation. Efforts were also made to involve the teacher as much as possible so as to assist in further motivating and interpreting Tommy's responses.

Problems were encountered throughout the testing as it was difficult a matter to sustain Tommy's attention and interest for any length of time. Hence, it was not possible to determine if meaningful communication was taking place between the examiner and Tommy.

Based on the impressions gained and concomitant test findings, Tommy's present level of cognitive functioning would appear to lie somewhere between a 2 1/2 to 3 1/2 year age level. His approach to most of the test items encountered in the testing situation was characterized by a haphazard, trial and error type orientation. Problem solving tasks that involv-

ed similarities and opposites, and counting proved to be most difficult. For example, Tommy was unable to do simple one place addition arithmetic problems or count beyond 4. Similarly, he had difficulty in identifying certain objects by functional use such as: a cup, shoe, penny, and automobile. He also had difficulty in precisely naming objectives such as: a box, key, fork or flag. Tommy was unable to name 10 of 18 pictures to qualify for credit on the vocabulary item at the three year age level of the Stanford Binet Test.

Vicual-perceptual skills also proved to be grossly underdeveloped for Tommy's chronological age. Particular difficulty was noted with fine visual discrimination. Consequently, he was unable to categorize or match up similar forms, shapes and dolors. By the same token, he was unable to match up identical pictures of various animals, a task that is given at the 3 1/2

age level in the Binet. Tommy also had considerable difficulty in adequately copying basic geometric forms and designs such as a circle, square, cross, triangle or rectangle. As a further indication of his poorly developed visual-motor skills, Tommy was unable to build a three block bridge despite repeated demonstrations by the examiner.

Recognition of basic colors is still a matter that is in doubt. When asked to select or use a specific color in conjunction with a particular task, Tommy was quite inconsistent in his performance. Even after making necessary corrections and naming the various colors correctly for him, he still persisted in selecting the wrong color on many occasions.

Due to the limitations in basic skill acquisition, it was not possible to complete the administration of the McCarthy Scales of Children's Abilities. A sampling of se-

lect test items in the various skill categories produced very limited results. Most of the tasks appeared to be considerably beyond Tommy's developmental level.

Summary and Recommendations

In brief, Tommy appears to be a very concrete oriented lad, who is unable at this time, to adequately handle symbolic or abstract problem-solving kinds of tasks. In Piagetian terms, this would place him somewhere within the sensory-motor stage of development. Expressive language is not presently being utilized for precise or specific purposes, but rather, in a random inconsistent manner. Learning appears to be taking place primarily by the visual-kinestetic or touch and manipulation method.

It is therefore recommended that Tommy be provided with a learning environment that is characterized by a great deal of

close structure and a teaching ratio of 1:1, if possible. It is further recommended that the curriculum be comprized of a large number of sensory-motor activities that involve the use of the kinesetic, visual, tactual and auditory modalities. Materials should consist of real concrete objects for the most part rather than pictoral representational kinds of materials. Obviously, a heavy emphasis should be placed on developing a positive reinforcement or reward system so as to help shape desired behaviors and motivate responses in the teaching situation.

(signed) Robert Robinson
Robert Robinson, Ph.D.
RRC Coordinator

Rettig
Exhibit 54

KENT PUBLIC SCHOOLS

321 N. DEPEYSTER STREET

KENT, OHIO 44240

OFFICE OF THE DIRECTOR
OF CHILD STUDY AND
SPECIAL EDUCATION

December 6, 1978

Mr. & Mrs. Matthias Rettig
586 Francis Street
Kent, Ohio 44240

Dear Mr. & Mrs. Rettig:

As was discussed with you at your son's IEP conference November 21, several sections of your four pages of written requests cannot be added to Thomas' IEP because they are not specific related services to be directly provided for him, therefore, not appropriate or required for inclusion as part of any student's IEP....

I further indicated, as chairman of the IEP review commitee, that requests for services that are not currently provided for any Kent City School Children or by Ohio

special education programs would not be added to any student's IEP. ....

Sincerely yours,

(signed)
M.J. Chrin, Director
Child Study & Special Education

MJC/sa

cc: Mr. Cardinal, Superintendent
Kent staff providing services for Tom

Exhibit A
Rettig Brief
USCA, 12-10-84

Behavior Therapy
and Family Counseling Center
6454 Van Nuys Blvd., Suite 150, Van Nuys,
Calif., 91401 (818)781-9922

Client Confidential

ASSESSMENT REPORT AND RECOMMENDATIONS

Date of Report: April 17, 1984

Referral Date: January 15, 1984

Period of Service: January 23, 1984 -
April 17, 1984

Identifying Information

Name: Thomas M. Rettig

Date of Birth: May 30, 1965

Address: 586 Francis St., Kent, Ohio

Referral Source: Eva Rettig, Mother

Reason for Referral

The purpose of this evaluation, as requested by Mrs. Rettig, was to test and evaluate Tom and to present a report and opinion concerning whether the current individualized education program (IEP) provides Tom with the free appropriate public education to which he is entitled. She

specifically seeks my professional recommendations for Tom's future IEPs to insure appropriate educational benefit.

Data Source

This assessment is based on material obtained from the following sources: 1) direct observation of Tom's behavior at home; 2) direct testing of Tom's behavior in response to instructional stimuli; 3) an analysis of "multi-disciplinary multi-factored evaluation reports" prepared by Kent Public Schools in October, 1981; 4) parent interviews; 5) an evaluation of Tom in community environments, reported by J. Bradley Garner on April 27, 1982; 6) a review of reports, evaluations, court transcripts and background information; 7) a review of Tom's present, and the two preceeding IEPs; and 8) a reinforcement inventory completed by Tom's mother.

Description of Services

Description of Services

Home visit - 12 hours

Phone interviews - 1 hour

Review of written records - 4 hours

Report writing - 8 hours

Background Information

A. Brief Learner Description. Tom is a young man who will have his 19th birthday next month. He has the problems and needs typically associated with the diagnosis of autism. He has speech but rarely uses it communicatively, except to make simple requests for things that he wants. He uses certain repetitive phrases, such as "how are you doing today" in a general way to interact with others. Tom requires verbal, gestural, and some physical prompting to carry out all self-care and home care activities. He can and does independently work with puzzles and seems to enjoy listening to music. He enjoys visiting next door with his grandparents, which

he is also able to do independently. Tom also demonstrates difficulty in generalizing what he learns, that is, in performing skills in any settings other than those in which the skill was originally learned. This problem, which is a function of his handicap, results from his over-reliance on prompts and cues provided by others as reflected in his last several IEPs.

B. Living Arrangement. Tom lives at home with his parents and sister, who is one year younger than he. The Rettigs are a warm close family, all of whom exhibit an appropriate level of concern for Tom and with what his future holds. A two bedroom apartment is attached to the house and the family's hopes are that this is where Tom will live, semi-independently, as an adult. Mr. and Mrs. Rettig have advocated relentlessly, through the local school district and the courts, for Tom to have an appropriate education. They

feel their efforts have only met with partial success and they plan to continue to do all they can to get Tom the educational services they feel he requires and is entitled to.

C. Educational Placement. Tom currently attends Roosevelt High School where he is enrolled in the Kent multi-handicapped (MH) program. There is apparently a total disagreement between the parents and the school concerning the nature of Tom's individualized educational program. On the one hand, the school asserts that Tom's placement and program are perfectly appropriate based on Tom's assessed needs. In contrast, Tom's parents remain convinced that the school has not begun to provide Tom with the educational program to which he is entitled. A surface review of Tom's IEP suggests that the school is attempting to meet its responsibilities. There are a number of critical problems, however, which

if resolved, could bring the school and parents closer together in their view of Tom's educational program.

D. Health and Medical Status. Tom is considered to be in generally good health. He has no history of seizures and is not taking any medication. His vision and hearing are considered to be normal. Tom does have severe allergies which require some caution in the food and drink that he is provided, although the maintenance of a completely rigid menu is no longer attempted by his parents. The recent and current IEPs do not address this important factor, nor do they reflect the fact that Tom's personal physician recommends a rotary diversified diet.

Analysis of Presenting Problem

The following analysis attempts to identify Tom's educational needs and to determine the extent to which his present program is designed and organized to meet

those needs. It also attempts to identify the educational benefits to which Tom is entitled but which are not incorporated into his present program.

A. Present Educational Needs Assessment. Reports by district personnel, state consultants and outside experts have previously identified many of Tom's important educational needs. Without undue redundency, these may be summarized as including a chronological age appropriate curriculum that addresses the development of functional skills, the opportunity to interact with nonhandicapped peers, individualized goals, objectives and plans, minimal reliance on educational inference (which assumes that a skill learned in a school setting can be performed by the student in the natural settings for which the skill was intended), and appropriate instructional measurement strategies.

I would add to this list, one con-

sideration that I feel has been lacking from previous discussions, reports and evaluations; that is, Tom's learning characteristics require the most powerful instructional technology available. His lack of motivation and his over-reliance on the cues and prompts provided by others, both of which are characteristics of autism and are therefore a function of his handicap, require that his instructional programs utilize a very carefully designed motivational system and instructional sequences that use the most effective prompts available. Effective in this sense means prompts that not only elicit a correct response but which can also be systematically faced out over time. The startling lack of activities that Tom is able to carry out independent of someone else's presence (and prompting) is dramatic evidence that only minimal learning has occurred and that the necessary instructional technology which

has been developed and implemented across the United States to meet educational needs such as Tom's, has not been significantly employed. Rather than increasing his independence and self-sufficiency,which is the purpose of special education, the present program has a tendency to increase dependency and this subjects Tom to a likelihood of institutional placement in the future.

B. Critical Characteristics of Tom's Present Educational Program. In my opinion, while Tom's present IEP appears to show an effort to meet Tom's educational needs in an appropriate way, it falls short of providing educational benefit in the following regards:

1. Many of the objectives are the same as have been addressed in one form or another for many years. There is no statement of Tom's present level of functioning specifically in regards to these

objectives, no evaluation as to the progress he has made or not made in reference to the objectives, and (perhaps most importantly) no statement as to what changes are being planned in the face of the previous lack of educational progress. This leaves the impression that even though Tom has not made significant progress in many areas and thus received not educational benefit from his IEP., plans are to continue as in the past. This strategy is surely to result in continued failure to reach the established objectives. New strategies need to be tried to break the apparent dead-lock.

2. The objectives (although many could be functional) are out of a real life context. A clear statement needs to be provided, if not in the IEP itself then at best in a supporting document, as to what will be taught after these objectives are mastered and how they will eventually lead,

in step by step fashion, to Tom's ability to independently perform a variety of ne-necessary activities in the domestic, vocational, recreational, and general community domains.

3. As an older adolescent, Tom needs to acquire a variety of vocational skills which will prepare him for future employment. This area is not given sufficient emphasis in Tom's IEP nor is it clear what his "in school job" is and how it will lead, in subsequent steps, to future employment.

4. Tom should be spending a significant portion of each school day in domestic, vocational and general community environments learning and practicing his skills in the settings in which they actually have to be performed. The more handicapped a person is, the less likely he will be able to generalize the skills taught in one setting to another. The

older a student becomes, the closer he gets to the day when he will no longer be attending school and must then function in other settings. Given the level of Tom's handicapping condition and his age, he should be spending less and less time on the school grounds and more and more time in direct instruction for his adult life.

5. Tom requires a 12 month program and an extended school day to meet his educational needs. Without these provisions he will continue to fail most of the objectives critical to his functioning as an independent adult. The nature of Tom's handicap is such that he requires an extended school day to receive educational benefit from his program. Further, in the absence of an educational program (such as occurs during summer breaks or even holiday breaks to a certain extent) he shows a regression in

skills and a delay in the recoupment of those skills when the program is resumed. The educational need for a 12 month program and an extended school day is not reflected in his IEP.

Mediators

Outside of the specific content of Tom's IEP and the inadequate instructional technology which is being employed, the most detrimental aspect of Tom's educational program is the lack of communication taking place between the school and Tom's parents. Both parties appear to be in firmly entrenched adversarial positions. If Tom is to have an appropriate educational program, something other than the courts as a forum for communication needs to be developed. A court appointed mediator with specific responsibilities may be a beginning solution to this problem. Recommendations in regards to this are made later in the report.

Motivational System

A reinforcement survey was completed for Tom by his mother. The results indicate a limited number of things which could be used effectively as positive reinforcement to strengthen Tom's learning and performance levels. These include carob bits, potato chips, riding his bike, visiting his grandmother, a MacDonalds hamburger and listening to music. Additional efforts are required to identify other potential reinforcers. While immediate tangible reinforcement should be utilized now to maximize Tom's learning and performance, a systematic plan should be developed which will teach Tom to work for delayed reinforcement. It should be recognized, however, that because of his handicap, Tom may need an artificial motivational system for an indefinite period of time. The exact nature of the motivational system should be documented in

writing to facilitate its consistent utilization in all environments including home and school. Without such a system, Tom cannot receive benefit from his education.

Recommendations

1. A mediator should be appointed by the court to facilitate communication between the school and Tom's parents. At a minimum, the mediator should negotiate an agreement as to Tom's IEP objectives, and the measurement procedures which will be used to evaluate Tom's progress in meeting those objectives. All aspects of Tom's educational program should reflect parent in-put and priorities. Given the adversarial history, a mediator undoubtedly is necessary for this to occur.

2. Tom requires a twelve-month program and an extended school day in order to meet his educational needs. The best evidence that Tom does not derive benefit

from his present program and essentially spends each year recouping those skills on which he regresses with each summer break isbased on an analysis of his IEPs over the last three years. These show that basically the same objectives are addressed year after year and Tom never gets beyond the stage of needing to be prompted through a given task, i.e., he rarely, if ever, is brought to a point where he can engage in an activity independently. This is despite the fact that his potential for independent activity is clearly demonstrated by his leisure pursuits of actively listening to music and successfully completing multi-part jig-saw puzzles. For example, of the 19 skills that were rated at the mastery level on his last IEP (dated 5-19-83), all nineteen required prompting by somebody else.

a. Given Tom's age, the severity of his handicaps, and his dependency on the

cues and prompts provided by others, he should be spending about 75% of his extended day learning and practicing those skills he needs now and will need to perform as an adult in those environments in which they must be performed. At a minimum, these other environments should include a home or apartment unit typical of the kind he will be living in as an adult, vocational settings that may offer him potential employment as an adult, community stores, and recreational sites he is likely to use as an adult. His parents can assist the school in identifying these locations.

b. At a minimum, Tom's IEP objectives should address vocational tasks, self-help tasks such as dressing and bathing, home care tasks such as food preparation, doing the laundry, community skills such as shopping and transportation, including street crossing, and recreational skills

adults need such as crafts and the like to spend free time constructively. All of these objectives should be part of an explicit systematic sequence of skills which Tom learns to perform in the actual environments in which they need to occur. Our primary educational goal is to develop behaviors which will contribute to Tom's ability to live an independent, productive and dignified life. A learning environment that encourages the development of functional skills is also procedurally important in our efforts to reduce his inappropriate and undesired behavior. To the extent that Tom exhibits a rich repertoire of appropriate responses, incompatible with inappropriate behavior, the latter behavior should occur infrequently, if at all. Many behavior problems occur in an environment lacking opportunities for or instruction in appropriate responses. In short, effective programming should be educationally beneficial

in further developing Tom's functional behavior, and may therefore in itself reduce the frequency of behavior problems. At the very least, the context of effective educational programming would make it feasible to design interventions for eliminating or reducing his behavioral excesses.

c. In each of the settings described above, Tom should be systematically taught to effectively communicate and build relationships with his nonhandicapped peers and other nonhandicapped people. For example, an art class with nonhandicapped peers would provide a good opportunity for Tom to accomplish a number of his educational objectives.

d. Tom's behavior problems, such as defecation, are without question a basic part of his disability. Accordingly, they must be properly assessed, and appropriate, non-aversive (i.e., non-punitive) behavior

modification plans should be explicitly developed and provide for systematic implementation across all of his settings. Unless the behaviors are dealt with, no progress towards independence can be made.

e. All of the above should be reflected in Tom's formal IEP.

3. An explicit motivational system should be developed and documented for utilization across settings.

4. Tom's teachers should participate in training offered by a federal grant to provide teachers with the latest technology in meeting the educational needs of students who are similar to Tom. Provided by the National Society for Children and Adults with Autism, this national personnel training program is available to all 50 states at a nominal cost. Without such training, it is unlikely that Tom's teacher will have the necessary tools to effectively teach him. Without the teaching required

for Tom, he will derive no educational benefit leading to independence from primary caretakers and/or an institutional setting.

Comments

The recommendations of this report are based in the assumption that Tom has the opportunity of continuing to live and to go to school in the community. It is unlikely that they would be realistic, if he were to be placed in a more restrictive settings. Even if gains could be established in a more restrictive setting, they could not be transferred and applied back to the community. Tom's problems are such that they should be treated directly in the community, in order to avoid the expected problems he is likely to have in transferring treatment gains from one setting to another. Finally, these recommendations are based on the already demonstrated success obtained in other public

schools which have dealt with problems even more challenging than Tom's for people whose cognitive levels were not even as advanced as his. An investment by society now will pay off in the future by contributing to Tom's ultimate ability to care for himself and decrease correspondingly, his need to be cared for by society. His special education program should address his educational needs so as to be reasonably calculated to insure educational benefit to Tom.

(signed)
Gary W. LaVigna, Ph.D.
Clinical Director

DEPARTMENT OF
Consumer Affairs

The Board of Medical Quality Assurance

of the State of California

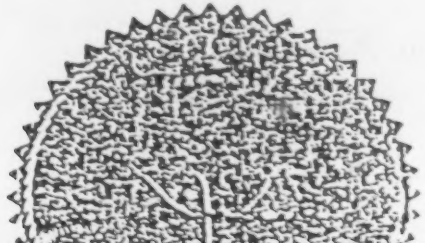
This is to Certify, that GARY WILLIAM LAVIGNA, PH.D. having shown to the satisfaction of the Psychology Examining Committee that he possesses the qualifications required by law, is hereby granted this License as a

Psychologist

in this State

and is entitled to all rights and privileges conferred by Chapter 6.6 of the Business and Professions Code.

In Testimony Whereof, THE BOARD OF MEDICAL QUALITY ASSURANCE of the STATE OF CALIFORNIA upon the recommendation and at the direction of the PSYCHOLOGY EXAMINING COMMITTEE has issued this license on the 26th day of August, 1977.



The Board of Medical Quality Assurance
OF THE STATE OF CALIFORNIA

K-121

ON THE RECOMMENDATION OF THE FACULTY
AND BY VIRTUE OF THE AUTHORITY VESTED IN THEM
THE TRUSTEES OF THE UNIVERSITY HAVE CONFERRED ON

GARY W. LaVIGNA

THE DEGREE OF

Doctor of Philosophy

THE DEPARTMENT OF EDUCATION

K-122

AND HAVE GRANTED THIS DIPLOMA AS EVIDENCE THEREOF
GIVEN IN THE CITY OF CHICAGO IN THE STATE OF ILLINOIS
IN THE UNITED STATES OF AMERICA IN THE YEAR OF OUR LORD
ONE THOUSAND NINE HUNDRED AND SEVENTY-FIVE
ON THE TWENTY-FIRST DAY OF MARCH

Chairman of the Board of Trustees

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Dean

Supreme Court, U.S.
FILED
JUN 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1843

In The
Supreme Court of the United States
October Term, 1985

THOMAS M. RETTIG; EVA O. RETTIG,
Petitioners,

v.

THE KENT CITY SCHOOL DISTRICT, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Whether the Petitioners are precluded by the doctrine of res judicata from seeking review by this Court of the questions presented in their petition for a writ of certiorari.

2. Whether the Kent City School District was required by the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.*, to provide Thomas Rettig with at least one (1) hour per week of extracurricular activity during the 1981-1982 school year.

LIST OF ALL PARTIES

Petitioners:

Thomas M. Rettig
Eva O. Rettig

Respondents:

Kent City School District
Dr. Donna G. Lightel (in her official capacity as Superintendent)

Michael Chrin (in his official capacity as Director of Child Study and Special Education)

State Board of Education

Dr. Franklin B. Walter(in his official capacity as State Superintendent)

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OPINIONS AND JUDGMENTS BELOW

The decision of the Court of Appeals for the Sixth Circuit filed on March 10, 1986, has not yet been officially reported. The Memorandum and Order of the United States District Court for the Northern District of Ohio, Eastern Division, filed on January 26, 1984, is not officially reported.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was filed on March 10, 1986. The petition for a writ of certiorari was filed on May 8, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

This matter is now before this Court for the second time. The case was originally initiated in February of 1978 when the Petitioners requested an impartial due process hearing, pursuant to the provisions of the Education for All Handicapped Children Act of 1975 (hereinafter referred to as the EAHCA), 20 U.S.C. § 1401 *et seq.*, questioning the quality of the special education being provided to Thomas by the Kent City School District. On April 30, 1979, the impartial hearing officer issued a comprehensive opinion which concluded that the Kent City

School District was providing Thomas a free appropriate public education as required by the EAHCA. The State Board of Education affirmed the hearing officer's decision.

Thereafter, the Petitioners commenced an action in the United States District Court for the Northern District of Ohio, Eastern Division, on November 30, 1979. The Petitioners sought a review of the state decision pursuant to 20 U.S.C. § 1415(e)(2), asserted violations of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and alleged constitutional infringements pursuant to 42 U.S.C. § 1983. After a trial on the merits, the District Court rendered its final order on August 25, 1981. The District Court upheld the impartial hearing officer's decision and found in favor of the Respondents on the vast majority of the issues. The District Court did, however, order the Kent City School District to incorporate one (1) hour of extracurricular activity each week in Thomas' 1981-1982 Individualized Educational Plan (IEP). This decision of the District Court is reported as *Rettig v. Kent City School District,* 539 F.Supp. 768 (N.D. Ohio 1981).

The Petitioners appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit, and the Kent City School District cross-appealed from the decision mandating the inclusion of one (1) hour of extracurricular activities per week in the future IEP of Thomas. On November 8, 1983, the Court of Appeals filed its decision. The Court vacated that portion of the District Court's decision concerning extracurricular activities and remanded this single issue to the District Court for further consideration in light of the decision of this Court in *Board of Education of the Hendrick Hudson Central*

School District v. Rowley, 458 U.S. 176 (1982). In all other respects, the Court of Appeals affirmed the District Court's judgment. This decision of the Court of Appeals is reported as *Rettig v. Kent City School District,* 720 F.2d 463 (6th Cir. 1983).

This decision of the Court of Appeals was appealed by the Petitioners to this Court on or about February 29, 1984. On May 21, 1984, this Court entered its order dismissing the appeal or in the alternative denying the petition for a writ of certiorari. *Rettig v. Kent City School District,* — U.S. —, 104 S.Ct. 2379, 81 L.Ed.2d 339 (1984). This Court also denied the Petitioner's application for rehearing on June 18, 1984. *Rettig v. Kent City School District,* — U.S. —, 104 S.Ct. 3549, 82 L.Ed.2d 852 (1984).

Meanwhile, on January 26, 1984, the District Court issued its order with respect to the single issue which had been remanded to it by the Court of Appeals. The District Court affirmed its earlier decision ordering one (1) hour of extracurricular activities per week. Thereafter, on February 21, 1984, the Respondent, Kent City School District, appealed to the Court of Appeals, and on February 27, 1984, the Petitioners cross-appealed.

On March 10, 1986, the Court of Appeals issued its decision which reversed the judgment of the District Court and dismissed the Petitioner's cross-appeal because it raised issues "that were fully litigated in the 1981 district court proceedings and have been previously resolved on appeal to this court and the United States Supreme Court." Slip Opinion, p. 7.

———o———

SUMMARY OF ARGUMENT

The issues raised in the petition for a writ of certiorari were not addressed by the Court of Appeals and are barred by the doctrine of res judicata.

In *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176 (1982), this Court held that a handicapped child receives a free appropriate public education pursuant to the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.,* when he is being provided "personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction," and that, in enacting the Act, it was not Congress' intent "to achieve strict equality of opportunity or services." The Court of Appeals correctly applied these standards in determining that the Kent City School District was not obligated to provide extracurricular activities to Thomas Rettig from which he would receive no significant educational benefit.

———o———

ARGUMENT

In *Allen v. McCurry,* 449 U.S. 90 (1980), this Court stated that "[u]nder res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." 449 U.S. at 94. In *Nevada v. United States,* 463 U.S. 110 (1983), this Court again defined res judicata, stating:

> Simply put, the doctrine of *res judicata* provides that when a final judgment has been entered on the

> merits of a case, "[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac,* 94 U.S. 351, 352 (1876). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948).
>
> 463 U.S. at 129-130

As stated above, the case *sub judice* is before this Court for the second time. Previously, this Court declined to grant certiorari to review the decision of the Court of Appeals rendered in 1983. *Rettig v. Kent City School District,* 720 F.2d 463 (6th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 2379, 81 L.Ed.2d 339 (1984). This earlier case involved the same parties and the same issues which the Petitioners are again seeking to present to this Court. The latest decision of the Court of Appeals, issued on March 10, 1986, was concerned only with the single issue relating to extracurricular activities. Accordingly, the Respondents respectfully submit that this Court should decline to issue a writ of certiorari in the case *sub judice,* because the questions presented in the petition are barred by the doctrine of res judicata. As the Court of Appeals concluded, these issues "were fully litigated in the 1981 district court proceedings and have been previously resolved on appeal to this court and the United States Supreme Court." Slip Opinion, p. 7.

In *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981), this Court stated:

> This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 518, 75 L.Ed. 1224 (1931). We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . ." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917).
>
> 452 U.S. at 401

Thus, in light of today's crowded dockets and the significant public interests served by the doctrine of res judicata, the Respondents respectfully submit that the Petitioners, having fully litigated their claims through the federal court system, are now precluded from again seeking to have their claims reviewed by this Court.

With respect to the single issue considered by the Court of Appeals, the Respondents, like the Court of Appeals, believe that the controlling principles are set forth in this Court's decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). This Court held in *Rowley* that the requirements contained in the EAHCA that a state provide specialized educational services to handicapped pupils generate "no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided to other children.'" 458 U.S. at 198. This Court further concluded

that "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." 458 U.S. at 192. The Court reasoned that a state could meet its obligations under the EAHCA "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction." 458 U.S. at 206. The Court further said that a handicapped child's IEP satisfied the requirements of the EAHCA if it is "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 207. Finally, the Court made it clear that, in enacting the EAHCA, Congress did not intend "to achieve strict equality of opportunity or services." 458 U.S. at 198.

The Respondents respectfully submit that the Court of Appeals correctly applied the foregoing guidelines in the present case. The Court of Appeals, in an opinion by Judge Krupansky, stated:

> Plaintiffs argue that the extra-curricular requirement imposed by the district court can be independently supported because the requirement was necessary to permit Thomas to benefit from his educational program. The Rettigs contend that Thomas' "free appropriate public education" should include activities required to assist him to "benefit from special education." 20 U.S.C. § 1401(17). However, the state-appointed hearing officer determined that because of Thomas' "sporadic and recurring behavior, including, regurgitation, lack of interest, self-stimulating activities, and bladder accidents," he was unable to significantly benefit from extra-curricular programs. Accordingly, the school district was not obligated to provide extra-curricular activities from which Thomas would receive no significant educational benefit.
>
> Slip Opinion, p. 7

In light of the foregoing, the Respondents respectfully submit that it is readily apparent that the Court of Appeals has faithfully applied the directives given by this Court in *Rowley,* and that the Kent City School District was and is continuing to provide Thomas Rettig with a free appropriate public education under the provisions of the EAHCA.

Finally, the Respondents direct the Court's attention to Sup. Ct. R. 21.5, which provides that the failure of the petitioner "to present with accuracy, clarity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." The Respondents submit that the Petitioners have failed to comply with this standard in the case *sub judice,* and accordingly, their petition should be denied on this basis.

———o———

CONCLUSION

Based upon the foregoing, the Respondents strongly urge this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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NO. 85-1843

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THOMAS M. RETTIG; EVA O. RETTIG,

PETITIONERS,

V.

KENT CITY SCHOOL DISTRICT,

DONNA G. LIGHTEL, SUPERINTENDENT,

MICHAEL J. CHRIN, DIRECTOR,
CHILD STUDY AND SPECIAL EDUCATION;

STATE OF OHIO BOARD OF EDUCATION,

FRANKLIN B. WALTER, SUPERINTENDENT
FOR PUBLIC INSTRUCTION,

RESPONDENTS.

BRIEF OF PETITIONERS IN REPLY TO

THE FILING ON JUNE 4, 1986 OF RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SUBMITTED BY:

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QUESTIONS PRESENTED

1. Whether Respondents Kent City School District and State of Ohio Department of Education are precluded by the Education for All Handicapped Children Act of 1975, 20 USC 1401 et seq. and by this Court's holding defining the role of a reviewing Court of cases filed under 20 USC 1415(e)(2) in Board of Education of the Hendrick Hudson Central School District v. Rowley, --US-- 73 L Ed 2d 690, 102 S Ct (1982) from relying on the doctrine of res judicata as espoused by them.

2. Whether the Education for All Handicapped Children Act of 1975 (EAHCA) enables and permits Respondents to refuse any and all after-school extracurricular activities to Thomas Rettig.

3. Whether Respondents have the right in this case to invoke this Court's jurisdiction under 20 USC 1254(1)

or whether Respondents are required to follow the EAHCA and Rowley, submitting to judicial review in accordance with Rowley's directives governing cases like the Petitioners' filed under 20 USC 1415 (e)(2).

4. Whether this Court should deny the pro-se certiorari petition based upon S Ct R. 21.5 as espoused in the Brief in Opposition by Respondents.

5. Whether this Court should review the documents introduced at the hearings in Kent and Columbus in 1979 and stolen from the District Court in 1981 prior to the proper disposition of the certiorari petition since they were never reviewed by a higher court. (In December 1984, the Sixth Circuit Court received, from the Office of the Ohio Attorney General, a package containing some duplicate copies of some of the stolen documents).

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OPINIONS AND JUDGMENTS BELOW

The opinion of the Sixth Circuit Court of Appeals filed 10 Mar. 1986 is included in the Petition for writ of certiorari at App. F-35.

The order of the District Court (N.D.Ohio) filed 26 Jan. 1984 is included in the Petition at App. E-27.

Also included in the Petition are the earlier judgment of the District Court at App. B-7, and the opinion of the first round in the Court of Appeals filed 8 Nov. 1983 at App. D-13.

The documentation concerning the stealing of the documents to escape judicial review by a higher court is included therein at App. C-10--12. The Office of the AG, in Dec.'84, provided a package of duplicate copies of some of the documents stolen in 1981 from the District Court. No complete list thereof is in existence.

JURISDICTION

The Respondents seek to invoke the general jurisdiction of this Court under 20 USC 1254(1) which apparently would provide them just about any standard of proof they chose to whitewash their clients and themselves instead of the review required in this case by this Court's directive in Rowley governing the judicial review of Petitioner's case filed under 20 USC 1415(e)(2). Apparently, these providers of public education propose to ride with the current, if this Court should indeed grant the review so desperately sought by the Petitioners. Another case involving the same parties has been pending in Judge Lambros' Court in Cleveland since July 15, 1983. The same arguments advanced in the Brief in Opposition have been advanced in that Court: res judicata despite the fact the documents were stolen and escaped review.

ARGUMENT

The initial complaint of Eva Rettig seeking to challenge the evaluations and placements was disposed of by the State of Ohio on a standard of proof by preponderance of the evidence in 1979 rather than by a statutory and constitutional level of proof. See Petition, App. A-6; App. G-46; App. H-50.

While the District Court received the documents that were provided with the filing of the administrative record from Kent and Columbus, none of them were ever reviewed by a higher Court because they were stolen from the District Court in 1981 and never returned to be certified and transmitted to either Cincinnati or Washington. The first hearing panel filed its opinion without their review on 8 Nov. 1983. Petitioners learned of the theft

in February 1984. Their efforts have been totally unsuccessful to receive the judicial review they deserve from a court higher than the U.S. District Court which may or may not have been provided all of the documents from the state level review in Columbus before Franklin Walter and the State Board of Education. Perhaps this is the reason the State Defendants and the Local Defendants smell(ed) sweeter than a rose. At this time, the Respondents are again effectively applying for a whitewash/vindication from this Court by hiding behind their theft and res judicata and behind S Ct Rule 21.5. alleging incompetence of the pro-se Petitioners' honest, sincere, and best effort to bring these officials and their lawyers to justice to permit relief and redress to these powerless citizens, the Rettig family fighting for their only son.

On January 26, 1984, the District Court acted on the remanded issue of extracurricular activities which is included in our Petition, App. E-27--34. At page E-29

> The Court found that
> ... the education that Tom received between 1976 and 1979 was primarily a classroom experience. In conjunction with the classroom experience, the Kent City School District did not provide <u>any</u> after school activities in which a child like Thomas Rettig might participate, although the School District did provide such activities for its nonhandicapped students. It therefore failed to provide after school activities on an equal basis, and has been in violation of (the regulation).
> 539 F.Supp. at 780.
> Neither the regulation nor this Court's interpretation of it violate the letter or spirit of <u>Rowley</u>. ...

And on page App. E-32, the Court says

> This Court's order concerning Rettig's extracurricular activities does not violate <u>Rowley</u>. We did not read the requirement of 34 C.F.R. 300.306(a) that the District "afford handicapped children an equal opportunity for participation" to

> mandate "strict equality of opportunity or services" eschewed by Rowley. Rather, this Court sought to rectify a situation in which the District had failed to "provide any after school activities in which a child like Thomas Rettig might participate..." Ordering the District to provide Rettig with at least one hour per week of extra-curricular activities did not seek to force it to provide services "sufficient to maximize (Rettig's) potential 'commensurate with the opportunity provided other children.'" 102 S.Ct. at 3046. The order simply sought to provide him with the "free appropriate public education" that is indisputably the subject matter of the Act. Id. at 3047.
> This Court therefore determines that its order concerning Rettig's extra-curricular activities was appropriate under the Act, the regulation, and Rowley.

This is in direct conflict with the citation of Judge Krupanski by Respondents in their Brief on page 7 where the Judge simply reports the opinion of the state-appointed hearing officer. The Judge did not review the requirements of the Act. The Judge did not review the District Court's opinion in accordance with the principles for review provided by

this Court in Rowley. What he did do, speaks for itself in our Petition, App. D-13 filed 8 Nov.1983 and App. F-35 filed 10 March 1986. Neither decision claims to have provided judicial review of the documents stolen from the District Court in Oct.1981. This Court denied the appeal of Thomas Rettig in 1984 as well. Now the Respondents expect this Court to refuse review as well. That would be a nice pay-off for stealing the documents and escaping the required review by hiding behind the doctrine of res judicata! Petitioners' issues have been raised in all of the federal courts, but they were never properly adjudicated at any time by any court. Full appellate review has been denied or refused, in conflict with this Court's holding in Rowley; --US--73 L.Ed 2d 690, 102 S Ct (1982) on page 694:

> 2. In suits brought under the Act's judicial review provision, a court must first determine whether the State has complied with the statutory procedures, and must then determine whether the individualized program developed through such procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Respondents urge this Court to apply a sham instead of the required review, by denying the Petition. Respondents further urge this Court to remove these Petitioners from its crowded docket to which Petitioners must reply that the school authorities should have provided the required services in the first place and these Petitioners would not have been forced onto any court's docket, let alone this Court's! Further, submitting the documents to appellate review would certainly have shortened this case! Why steal the exhibits?

Respondents claim that the Court of Appeals correctly applied "guidelines" and "controlling principles." Petitioners must reply with the biggest emphasis possible: Without the required multi-factored evaluation as the legal basis for the public education, Petitioner Thomas Rettig's educational needs were never fully identified, let alone fully addressed by Respondents. He is now 21 years of age and more than ever dependent on caretakers. He received no educational benefit from his educational career now all but over. He has been, for seventeen years, deliberately and systematically retarded in all areas of human development: academic, social, and vocational. Director Chrin of Kent and those above and below him have seen to it that their prophesy made in 1970 and enforced all along has been fulfilled on poor defenseless Thomas.

In their Brief in Opposition, at no time do the Respondents rely on any documents in the administrative record to prove that the evaluations and placements of Thomas have been in full compliance with State Standards for Special Education, nor with relevant federal regulations concerning due process and procedural safeguards. The Petitioners, on the other hand, have requested, under S Ct Rule 19.2, that specific documents from the administrative record be located, certified, and transmitted to this Court prior to its disposition of the certiorari petition. The request has been denied by the Offices of the Clerks in both Cincinnati and Washington, despite the provisions of S Ct Rule 19.2. The Clerks apparently have their own unpublished rules; and the phone number of the Clerk in this Court was out of commission on 6 Jun 1986.

CONCLUSION

The Petitioners implore this Court to grant their Petition in order that they may finally receive their due from the Respondents who have forced this family to litigate since 1977 when the "informal" efforts begun in 1970 remained fruitless for the handicapped child. The father of this family of four has been a teacher in the Kent City School District since 1965, the year Thomas was born. The mother has abandoned her career as teacher and devoted countless hours preparing and filing documents in the school and in the Courts. All to no avail, if Respondents get their way in this Court. Please grant the petition and review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

All parties required to be served have been served. The original typed copy of this Reply Brief filed in the United States Supreme Court on Monday, ~~May 12,~~ June 9, 1986, carries the seal and signature of a notary public, as required by S Ct Rule 28.5(c).

I acknowledge that I mailed by first class, postage pre-paid, three copies of this Reply Brief to Dennis Whalen, 565 Wolf Ledges Parkway, P.O.Box 2020, Akron, OH 44309-2020; and likewise, to B. Douglas Anderson, Asst. Atty. Gen. of Ohio, State Office Tower, 30 East Broad St., Columbus, OH 43266-1410 on this day of June 1986 upon receipt of the Brief in Opposition on 6 June 1986.